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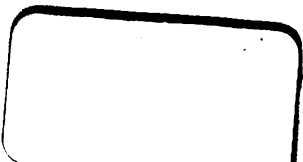
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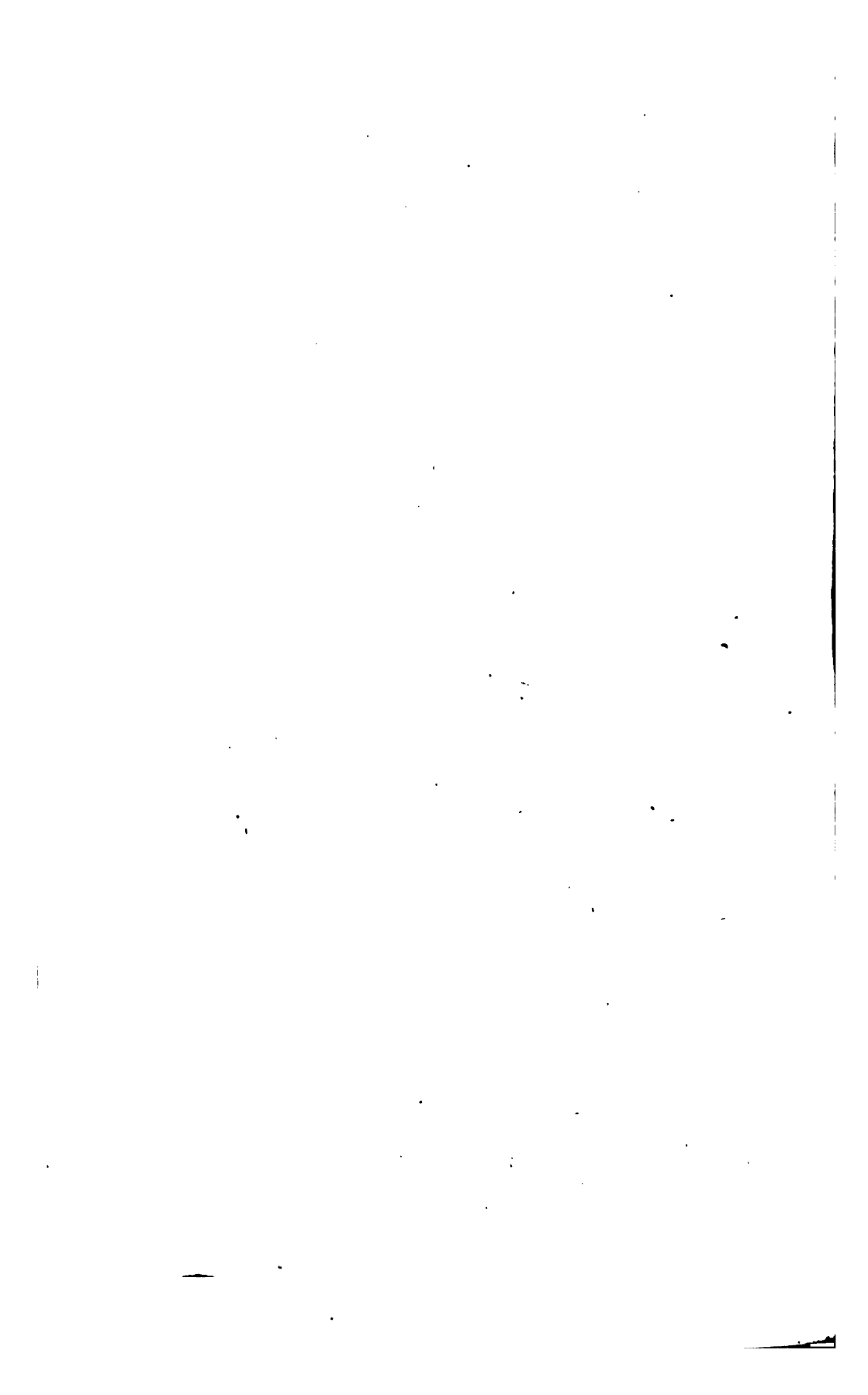




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Apr. 1

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK.

BY E. PESHINE SMITH,
Counsellor at Law.

VOL. X.

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1870.

Entered according to Act of Congress, in the year MDCCLXII, in the Clerk's Office
of the District Court of the United States for the Northern District of New York, by
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Also.—Entered according to Act of Congress, in the year MDCCLXII, in the Clerk's
Office of the District Court of the United States for the Northern District of New York,
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the benefit of the People of the said State.

Rec. Dec. 12, 1870.

C. VAN BENTHUYSEN & SONS,
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JUDGES OF THE COURT OF APPEALS.

1861.

GEORGE F. COMSTOCK, CHIEF JUDGE.

SAMUEL L. SELDEN, HIRAM DENIO, HENRY E. DAVIES, JOHN A. LOTT, AMAZIAH B. JAMES, CHARLES MASON, JAMES G. HOYT,	}	JUDGES.	}	Justices of the Supreme Court, and, ex officio, Judges of the Court of Ap- peals from January 1, 1861, to January 1, 1862.
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1862.

SAMUEL L. SELDEN, CHIEF JUDGE.

HIRAM DENIO, HENRY E. DAVIES, WILLIAM B. WRIGHT, JOSIAH SUTHERLAND, GEORGE GOULD, WILLIAM F. ALLEN, E. DARWIN SMITH,	}	JUDGES.	}	Justices of the Supreme Court, and, ex officio, Judges of the Court of Ap- peals from January 1, 1862, to January 1, 1863.
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AN ACT IN RELATION TO THE JUDICIARY.

[Ch. 289 of 1847.]

"§ 5. The judge of the Court of Appeals elected by the electors of the State, who shall have the shortest time to serve, shall be the Chief Judge of said court.

"§ 6. Four justices of the Supreme Court, to be judges of the Court of Appeals, shall every year be selected from the class of said justices having the shortest time to serve; and alternately, first, from the first, third, fifth and seventh judicial districts, and then from the second, fourth, sixth and eighth judicial districts; and shall enter upon their duties as judges of the Court of Appeals on the first day of January, and serve as judges of said court one year."

RULES.

XXVII In all cases where the notice of argument is filed with the Clerk of this court, there shall be filed with the same, due proof or admission of the service of notice of argument upon the adverse party. And the Clerk is directed not to enter on the Calendar any cause in which proof of the service of said notice is not filed with him.—[*Adopted September Term, 1862.*]

XXVIII All causes in which a re-argument is ordered may, at the election of either party, be placed on the calendar at the next term after such re-argument is ordered, or the following term—the same to take its original place on the Calendar.—[*Adopted December 31, 1862.*]

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IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

December Term, 1861.

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GILMAN v. REDDINGTON *et al.*

A trust to receive the rents and profits of real estate and apply them to the use of the issue of the testator's infant children, for a period not exceeding two lives in being, is not void because the beneficiaries are not ascertained.

The statute (1 R. S., p. 723, § 55), does not forbid a shifting use for the benefit, in case of the death of the primary beneficiaries, of persons unknown or not in existence at the creation of the trust.

Nor, it seems, does the statute invalidate a trust which may permit the sale of the real estate and the application of the proceeds to the use of such unborn beneficiaries, within the duration of two lives in being.

A provision in a will that trustees in whom real and personal estate was vested, should apply the rents and profits to the use of the testator's infant children and their unborn issue for the lives of the two youngest of three children, though by possibility two or more successive generations might enjoy the benefit for their lives, respectively, does not contravene the statute (1 R. S., p. 723, § 18), against the creation of successive life estates, or of a remainder for life upon a term for years, in favor of persons not in being.

The trustees were required to "pay, convey or make over" the real and personal estate upon the death of the two younger children or the expiration of thirty years, to the survivors of such children or the issue then living of such as might be dead, in equal proportions, the issue to take the share of the parent, with a substitutional limitation in favor of other

Gilman v. Reddington.

persons: *Held*, that the children took a vested fee determinable as to each upon his dying without issue within the prescribed period. - It does not invalidate the trust that it enables the trustees, in their discretion to apply the entire income and profits, or the estate itself, to the use of unborn posterity, to the exclusion of the testator's children. It creates no illegal suspense of the power of alienation, that the executors after expiration of the trust term, may be required to retain in their possession real and personal property—the ultimate right to which has vested—for the purpose of paying the income to the widow for her life. The will directed a certain portion of income to be accumulated, without restricting the period to the minority of the children. This provision being void as to the income after the termination of such minority, the surplus goes, *it seems*, to the children as presumptively entitled to the next eventual estate.

THE action was commenced in the Court of Common Pleas of the city and county of New York, by Mrs. Hannah E. Gilman, to procure a determination as to the validity and construction of her deceased husband's will, and for a distribution of his estate. The testator died in February, 1853, leaving his widow, the plaintiff, and three children aged, respectively, one, three and five years, the youngest of whom died about a year later. By his will he gave some pecuniary legacies, and to his widow he gave the interest during life, or so long as she should remain single, on certain sums of money. The bulk of his estate, which was partly real, but principally personal, he disposed of in a residuary clause. At the original trial or hearing before Mr. Justice INGRAHAM, certain dispositions made by the will were adjudged to be void. His decree was modified on appeal to the general term of the Common Pleas, and the plaintiff appealed to this court. The defendants and respondents are the executors of the will, and the two surviving children. The executors were appointed by the will to be also guardians of the children. The residuary clause and such other parts of the will as are material, are set forth in the opinion of COMSTOCK, Ch. J.

Charles O'Connor, for the appellant.

Peter G. Clark, for the respondents.

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COMSTOCK, Ch. J. The principal questions in the case arise under the residuary clause of the will. By that clause, the testator devised and bequeathed the residue of his estate, real and personal and mixed, to his executors in trust to "manage" and apply the same or the income thereof, or so much of the estate or income as they should see fit in the exercise of a sound discretion, to the education and support of his three infant children or such of them as should survive, or of the issue of any who might die, until the two youngest should attain the age of thirty years, or until those two children should be dead, if they should die under that age; at which time the trust estate was directed to "be paid, conveyed or made over" to the said three children or such of them as should then survive, or to the issue then living of such as might be dead, in equal proportions, so that the issue might have the share of the parent. The clause then further provides that if all the children should be dead at the period of distribution without issue then living, the said residuary estate should go to the testator's widow and to his brothers and sisters and their issue in certain proportions specified. If the widow should be dead, then the brothers and sisters and their issue were to have the whole. The executors were appointed the guardians of the children with direction to take the care and superintendence of their education, and they were also directed to take the whole care of their property, and to keep it well invested for their benefit, with a discretion to invest not more than half in productive real estate. In no other part of the will was anything given to the children. The youngest of the children died after the death of the testator, at the age of two years.

The testator left a large personal, and a moderate amount of real estate, and both kinds were included in those dispositions, the validity of which is to be tested by the rules of the common law as modified by our statutes concerning "the creation and division of estates" in land: concerning "uses and trusts;" and by the statute relating to "accumulations of personal property, and to expectant estates in such property." In

Gilman v. Reddington.

respect to real estate, it is declared in these statutes that the absolute power of alienation shall not be suspended for a longer period than during the continuance of two lives in being at the creation of the estate. (1 R. S., p. 728, § 15.) In respect to personal estate, the provision of law is that the absolute ownership shall not be suspended by any limitation or condition for more than two lives in being at the date of the instrument containing such limitation or condition, or if such instrument be a will, for not more than two lives in being at the death of the testator. (1 R. S., p. 778, § 1.) The residuary clause in question, unless it be construed as containing by implication an authority to sell the real estate, suspends the power of alienation during the continuance of the trust (1 R. S., p. 780, § 65), and I assume that the same trust also suspends for a like period the absolute ownership of the personal estate. As to both kinds of property it will be seen hereafter that an absolute and perfect estate is not given to any person or class of persons in being at the death of the testator. But the trust is so constituted that it must terminate when two specified lives in being at the date of the will and at the death of the testator are spent, and it must terminate sooner, provided the two youngest children attain the age of thirty years, or provided either attain that age after the death of the other. So far, therefore, there is plainly nothing in the law of perpetuity which condemns this limitation in respect either to real or personal estate.

The general character or purpose of the trust is also lawful. In respect to the real estate, it is in substance and effect a trust to receive rents and profits and apply them in a course of expenditure for the education and support of the beneficiaries, or by way of accumulation (impliedly directed) for the ultimate benefit of the objects designated. Waiving at this time the question of accumulation, this is a valid trust because it belongs to the class expressly permitted in the statute of uses and trusts. (1 R. S., p. 728, § 55.) Trusts in personal estate are subject to no statutory restriction: in other words the legislature has never attempted to define and enumerate the lawful

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occasions for creating such trusts. They stand therefore, as at the common law, subject only to the statutory rule against the suspension of ownership for more than two lives. At the common law there is no doubt as to the validity of trusts like the one in question.

The statute above mentioned in relation to personal property. (1 R. S., 778), after prescribing the rule of perpetuity in the first section, declares, in the second, that in other respects limitations of future and contingent interests in personal property shall be subject to the rules prescribed in the statute relating to future estates in lands; and those rules are contained in the article "of the creation and division of estates." (1 R. S., 721.) In the future consideration of the residuary clause, it will be convenient to regard its dispositions as though they related wholly to real estate. If, viewed in that manner, they are found to be valid, their validity certainly cannot be questioned so far as they relate to personal property.

It is urged then against the validity of this trust, that the rents and profits or income of the estate might, by possibility, be applied to the education and support of unascertained persons, to wit, the issue of any two of the children of the testator who might die during the trust term. The trust as we have said, must terminate on the decease of the two youngest children. But the eldest child and one of the two youngest might die leaving issue, while the other might survive and be under thirty years of age. In such an event, the testator provided for a succession, in favor of the issue, to the provision for education and support intended primarily for the parents. I think there is no objection to this provision. The statutory trust is "to receive rents and profits, and apply them to the use of *any person*." If the person primarily designated dies during a trust term lawfully constituted in respect to its duration, there is nothing in the terms or policy of the statute which prevents the use from being shifted to some other object of a testator's bounty. Nor has it ever been held that the person or persons must all be named or in existence, and known at the creation of the trust. Such a construction would be

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quite too technical and narrow. The law ought not to condemn a succession in favor of the unborn issue of a child who may die before the time which the author of such a trust has lawfully prescribed for its termination. Future and contingent limitations of real estate in favor of unascertained persons, and especially in favor of the issue expected to be born of a son or a daughter, are familiarly known to the law, and I am satisfied that our statute of uses and trusts does not exclude them where the interest beneficially given is in rents and profits, as in the case before us. The statute allows the application of rents and profits to the use of "any person" (§ 55), and this fairly includes a contingent limitation in favor of persons who are unascertained at the creation of the trust.

It is, also, a characteristic of this trust, that the executors may, in their discretion, apply not only profits and income to the education and support of the testator's children, and contingently of the issue of those children, but a like application may be made of the estate itself. This authority to apply the estate more appropriately refers to the money and personal property left by the testator. It can have no reference to the real estate, unless a power to sell for the purpose intended be implied, and the implication is certainly somewhat remote. If such a power can be inferred, then the trust in this particular feature is to sell lands for the benefit of legatees, which is among the permitted trusts (§ 55, sub. 3): and there can be no doubt that the beneficiaries or legatees under such a trust may be unborn issue, as well as persons in being and named in the instrument which creates it; regard being always had to the rule respecting perpetuities. If we consider this feature of the limitation as relating wholly to the personal estate, the proposition is still more plain.

Passing to another objection which has been urged, the statute "of the creation and division of estates" declares that successive life estates shall not be limited, unless to persons in being at the creation thereof. (1 R. S., p. 728, § 18), also that no estate for life shall be limited as a remainder on a term for years, except to a person in being at the creation of such

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estate. (*Id.*, § 21.) On the argument it has been said that the residuary clause contravenes these provisions of law. But this argument rests upon a misconception or misinterpretation of the clause itself. First, as to the temporary dispositions during the continuance of the trust: these are a provision simply for education and support out of rents and income with a discretion in the executors to draw upon the estate itself for those purposes only. Now while it is true that the education and support of a child must necessarily terminate with its life; and while it is true, also, that the issue would succeed to the same provision, if the parent died during the trust; and while in the nature of things the issue could enjoy such a provision only during life also, yet such a limitation does not create a life estate or any other estate in the property to which it relates. On the contrary, the whole estate is in the trustees, who are to make the application. The statute of uses and trusts declares this to be so in respect to lands (1 R. S., p. 729, § 60), and as to money and personal property it is so by the rules of the common law. Indeed, according to the plain sense of such a provision as we now speak of, resting as it does in the discretion of persons who are guardians and trustees, it creates, at most, only a special charge for purposes which may expand or contract, and it has no resemblance to a title or estate for life or for any other period.

In the next place, as to the limitation of the corpus of the estate, this is to take effect at the end of the trust, to be consummated by a conveyance of the land, unless a power to sell be implied for the purpose of equal distribution, and by a transfer of the personal fund. Trusts to convey lands to a beneficiary are not enumerated in the statute of uses and trusts but they are valid as powers in trust where the purpose of the power is lawful. (§ 58.) For the present purpose it is only material to observe that the estate is given entirely and not for life to the three children of the testator. The limitation it is true, is of a future estate, to take effect in possession at the end of the trust term. Until then the title is wholly in the trustees: I mean wholly during the term and as a temporary

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estate. But the future estate or remainder is in fee, and it is vested in interest at the death of the testator, wholly in the three children. According to the statute (1 R. S., p. 728, § 18), a future estate is vested when there is a person in being who would have an immediate right of possession on the ceasing of the intermediate or precedent estate. The three children were in being at the death of the testator, and by the very terms of the devise would be entitled to the possession and enjoyment of the estate at the expiration of the trust. It was, therefore, a present and vested devise of a future estate. And, as I have said, the devise is in fee. It is true that issue is mentioned in the limitation. But to mention heirs or issue after a general devise, adds nothing to, and subtracts nothing from, such a limitation. If a child should die during the trust term, leaving issue, such issue would take in succession to the parent under the canons of descent, and in like manner would be entitled to possession at the time appointed. Yet the estate was not given to the children as a fee simple, absolute, because it is qualified by a conditional limitation in favor of the survivor, if any child should die during the term, without issue; and if there shall be no survivors or issue of survivors, then there is also a substituted limitation in favor of other parties. The estate is, therefore, given to the three children as a base or qualified fee determinable as to each on a dying without issue within a prescribed period. When that period is reached the condition will be gone, and the estate of the children or of any child surviving, will be perfect. These principles are well settled by authority. (*Fosdick v. Cornell*, 1 Johns., 440; *Anderson v. Jackson*, 16 Id., 882.)

It follows from what has been said, not only that no successive life estates but no life estates at all were created by the residuary clause of this will; and the argument founded on the assumption that such was the effect of the clause falls to the ground.

The discretion vested in the executors to apply rents, profits and income, and the estate itself, to the education and support of the objects named, has also been mentioned as an

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objection to the trust. We think there is nothing in this objection. The general purpose of the trust and the mode of its execution are clearly pointed out. The discretion relates to the amount of expenditure for the purposes indicated. This amount would depend on the varying exigencies which might be expected to arise in the situation of the persons intended to be provided for, and it was not only lawful but probably wise to repose a discretionary authority in the executors and guardian, who, it must be supposed, were selected with a due regard to the delicate nature of their trust.

Aside from the residuary clause the only other provisions of the will, upon which any question arises, are the following: The testator bequeathed to his widow during life, the income of five thousand dollars, to be invested in stocks of certain enumerated kinds, or on bond and mortgage; he also bequeathed to her during widowhood, two-thirds of the income of \$20,000, to be invested in the same manner, with a discretion to invest one-half of the sum in productive real estate, and the other one-third of the income he directed to be invested and added to the principal. The principal of these two sums is not in terms further mentioned in the will. It is extremely plain, however, that they pass under the residuary clause, which follows the provisions here mentioned, and are subject to the dispositions in that clause contained.

Referring now to the whole residuum, including these two principal sums of \$20,000 and \$5,000, it is said that the ultimate limitation of it is too remote. That limitation is to take effect as we have seen at the end of the trust term, which, as we have also seen, is legally constituted in point of duration. If the primary disposition in favor of the testator's children shall then fail in consequence of the death of all of them without issue, the widow and the brothers and sisters of the testator and their issue will be entitled to take the estate immediately as substituted devisees or legatees. All contingencies cease at that time; the trust also terminates, and consequently there can be no further suspension of alienation or of ownership. The only question which can arise in this connection

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tion, relates to the two sums of money which are here spoken of. It may possibly happen that the trust term will come to an end by the death of the two youngest children, during the life or widowhood of the testator's widow. She will, nevertheless, continue to be entitled to her interest, and notwithstanding the general direction to pay over the estate to the parties ultimately entitled, it may be the duty of the trustees, in the event supposed, to retain these moneys under their control until her right to interest shall cease. The will itself, perhaps, admits of this construction, and if so it amounts to a direction that the money be retained. The special trusts, however, contained in the residuary clause will have ended, and the trustees will continue to hold this part of the fund as executors merely. The inquiry is, whether these arrangements of the will render possible a suspense in the ownership of so much of the estate beyond the two lives which are the limit of the trust term. We think not. The question relates, it will be seen, to a principal sum the right or title to which must absolutely vest, at the termination of the trust, in the children or their issue, or in the substituted legatees. The estate, as we have already observed, will be no longer of a determinable character, but will be absolute. The possession of these sums of money will be postponed until the widow's right to interest shall no longer intercept its actual payment. Looking at the question then, as we must, from that point of time, the principal is in the nature of a remainder absolutely vested in interest, while the right to interest is in the nature of a present estate in the same sum of money. Now, a vested remainder in land is not in any sense inalienable, and a right in the nature of a vested remainder to money or personal estate is as absolute and perfect as any other right of property. The right now in question is perhaps still more analogous to a vested pecuniary legacy payable without interest at a future day. If gifts of that nature are held to create a suspension of absolute ownership, in the sense of the law against perpetuities, it would be necessary always to limit them in some form upon life. A vested legacy, payable in three years or at any other period not

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depending on a life or two lives in being, would, in that view of the subject, be void. Plainly, such is not the rule of law.

The subject of accumulation has not yet been considered. In the clause of the will giving to the widow two-thirds of the income of \$20,000, the other one-third is directed to be invested and added to the principal, and it goes with the principal into the residuum, no other disposition being made of it. Considering the amount and value of the residuary estate, it is probable that all the income will not be expended during the trust for the education and support of the children or their issue. In that event it will clearly be the duty of the trustees according to the will to accumulate the surplus, and this amounts to a direction for such accumulation. This direction is void so far as it includes any period of time beyond the minority of the children respectively, and the court below has so decided. The result, however, is not an absolute intestacy as to the surplus income after the minorities shall cease. The statute declares that "when in consequence of a valid limitation of an expectant estate there shall be a suspense of the power of alienation or of the ownership during the continuance of which the rents and profits shall be undisposed of and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate." (1 R. S., p. 726, § 40.) This section relates immediately to the rents and profits of land. But the statute which has been cited, relating to personal estate and the accumulation thereof, it has been held, refers to and adopts the same rule. (1 R. S., p. 778, § 2; *Kilpatrick v. Johnson*, 15 N. Y., 322.) The children of the testator are presumptively entitled to the "next eventual estate" in both the real and personal property, and according to this rule the surplus income, after their minorities shall cease, will be payable to them without accumulation. The decree of the court below might very properly have so declared. But the widow only has appealed to this court, and she is not aggrieved by the absence of such a provision in the judgment which has been rendered.

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Aside from the unlawful direction for accumulation, our conclusion is that the will is valid in all its parts and provisions. As we understand the final judgment below, it is in accordance with this conclusion except in one particular. It contains a clause declaring void the provision in the residuary clause which authorizes the income of the estate to be applied contingently to the education and support of the unborn issue of the testator's children during the trust term. We have shown that there is no valid objection to such a limitation. The executors, if they had appealed, might very properly have claimed a modification of the judgment in this respect. Although there is no appeal either by them or the children, yet the contingent rights of unborn issue are in question, and we think this court, in pronouncing a decision upon the general appeal of the plaintiff, ought to see that such rights are protected. The result is that the judgment should be reversed and amended as to the particular clause here mentioned: that in all other respects it should be affirmed.

All the judges (except SELDEN, J., who was absent) concurring,

Ordered accordingly.

24	20
129	112
24	20
141	106

SANFORD v. BENNETT.

The statute (ch. 130 of 1854) exempting from prosecution for libel the publishers of legislative debates, &c., is prospective only and is no defence for a publication prior to its enactment.

The publication of a slander uttered by a murderer at the time of his execution, is not privileged either under that statute or at the common law. The statute relates only to statements made in judicial, legislative or administrative bodies in execution of some public duty.

APPEAL from the Supreme Court. The action was for publishing alleged libelous matter, affecting the professional character of the plaintiff as a counsellor at law, in the defendant's

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paper, The New York Herald, as part of the speech made by Warren Wood, just previous to his execution pursuant to a conviction for murder, in Greene county, on the 20th day of January, 1854. An account of the execution, with the speech of the convict, was first published in the Greene county Whig, at Catskill, on the 21st January. This was copied into the defendant's paper on the 25th January, preceded by a statement showing that it was taken from the Catskill paper. It was selected for publication by a person in the employment of the defendant without his personal agency or knowledge. It was proved as a fact on the trial of this case, that Mr. Tremain was associated with the plaintiff as counsel for the prisoner on his trial, but that the imputations of improper conduct on the part of the plaintiff were untrue in fact. The portion of the speech commented upon as libelous was as follows: "I placed entire confidence in him" [the plaintiff], "and left my case wholly to him. And what did he do? He discharged my witnesses without the knowledge of myself or Mr. Tremain. Tremain said it was wrong and ought not to have been done. He did not do as he agreed to" [here he commented harshly upon the conduct of Mr. Sanford]. "Gentlemen, I feel it my duty to tell you these things. I may go too far, but I hope not; and I trust you will excuse me. I have no hard feelings against any man, but I feel it my duty to warn you all. If you ever employ Mr. Sanford" [here he again commented harshly]. "He pleaded well and did well with what he had; but he sent important witnesses away, and that is why I blame him."

The case was tried before James R. Whiting, as a referee, who found the defendant guilty, and assessed the damages at \$250. The defendant insisted, at the trial, upon the several points discussed in the following opinion; and he appealed here from the judgment of affirmance of the general term.

D. D. Field, for the appellant, insisted that the publication was privileged by force of the act of 1854, chapter 180; or, if

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that act did not apply, that it was a privileged publication by the rules of the common law.

Lyman Tremain, for the respondent.

DENIO, J. It being impossible to deny the libelous character of the publication, or to maintain that the defendant was exempt from responsibility on account of the article having been copied from another newspaper, though it was stated to have been so copied, the only question is whether it was what is termed a privileged publication. I am of opinion that the statute which is relied on has no application to the case; for the reason, in the first place, that the publication was made before the enactment of the law, and that its provisions are not retrospective. The act was passed on the 1st day of April, 1854, more than two months after the publication complained of, and took effect immediately upon its passage. It declares that no reporter, editor or proprietor of any newspaper shall be liable to any action or prosecution, civil or criminal, for a fair and true report in such newspaper, of certain proceedings therein referred to. This is the ordinary language employed where a new rule is intended to be established for future cases. To render it in terms applicable to publications theretofore made, it should have read that the party should be exempt from liability for such reports already made, as well as for such as should be made in future. The general rule is that the character and consequences of particular acts are to be determined by the law which was in force when the acts were done; and though it may be in the power of the legislature to declare that a given class of libelous publications already made shall not thereafter be prosecuted—for such an act would not impair rights of property actually vested—still, as such legislation is very unusual and would, in most cases, be highly objectionable, the judges should require very plain and unequivocal language before determining to give a statute such a retroactive effect. The words, no reporter, &c., shall be liable—for a fair and true report,—according to

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their natural and grammatical meaning, refer to a future report as well as a future liability, and do not, therefore, as I think, admit of the construction attempted to be placed upon them. But if they were equivocal we ought, upon well settled principles of interpretation, so to construe them that the change in the law, if the statute really effects a change, shall operate prospectively only. *Dash v. Van Kleeck* (7 Johns., 477), is the leading case upon this subject. It appears that at the common law, if a prisoner was committed to jail upon final process for debt, and escaped, yet if he voluntarily returned before action brought against the sheriff for the escape, such return might be pleaded in bar, and furnished a defence. The statute authorizing the sheriff to admit prisoners to the jail liberties on giving bail not to depart from them, was held by the courts to have so changed the law, as that, after the passage of that act, a voluntary return, even before suit brought, would not exonerate the sheriff from liability for the escape. This was the state of the law when the escape took place, for which Dash, the creditor, sued Van Kleeck, the sheriff. But pending that action the legislature passed a statute declaring that nothing contained in the act concerning jail liberties should be so construed as to prevent any sheriff, in case of escapes, from availing himself, as at common law, of a defence arising from a voluntary return of the prisoner before an action should be commenced for the escape. The defendant attempted to avail himself of the statute by showing that the prisoner, for whose escape he was sued, had returned to custody before the bringing of the action; and the question was thus presented whether the statute should be construed retrospectively so as to affect prior escapes and voluntary returns, or prospectively only. And it was held, notwithstanding the strength of the language used, that it could not be so construed as to embrace cases happening anterior to its passage. It was laid down as a principle of universal jurisprudence, that all laws are to be construed as furnishing a rule for future cases only, unless they contain language unequivocally and certainly embracing past transactions. The opinions of Chief Justice

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KENT and Mr. Justice THOMPSON examine all the prior authorities, and contain the general reasoning upon which the doctrine stands, and the case has always been considered as establishing that doctrine upon a firm foundation. (*Butler v. Palmer*, 1 Hill, 824; *The People v. Carnal*, 2 Seld., 468; *Wood v. Oakley*, 11 Paige, 400; *Ely v. Holton*, 15 N. Y., 595.)

But I am of the opinion that the case would not fall within the provisions of the statute if it had been in force at the time of the publication complained of. A publication, to be privileged within the terms of the statute, must be "a fair and true report in such newspaper of some judicial, legislative or other public, official proceedings," or of "some statement, speech, argument or debate in the course of the same." It is declared in another section that the enactment is not to be "so construed as to protect any such editor, reporter or proprietor from an action or indictment for any libelous comments or remarks superadded to or interspersed or connected with such report." The execution of a capital sentence upon a convict is no doubt a public proceeding of a very solemn and impressive character, but it is not one which necessarily admits of any speech, argument or debate, or of any statement of fact except the simple announcement of the authority under which the act is done. Other things may be said at the time by the public officers, the ministers of religion, who may be in attendance, by the bystanders, and by the convict himself; but these are no necessary part of the public proceedings. They are not required by the law, and they cannot in any way influence the act about to be performed. It is quite usual for the convict to make a statement or speech either by way of confession, or in vindication of himself as the case may be; and it is also customary for the attending clergyman to conduct the devotions in a public and audible manner. But these are simply incidental to the public proceeding, and not a portion of it: whether they take place or are omitted is of no legal consequence. Suppose, for instance, that the minister should make his prayer the vehicle for injurious reflections upon the prosecutor, or his witnesses, and the imputation should be of such a character as to support an

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action for verbal slander, no one, I presume, would contend that the words would be privileged, or that, if printed, the publisher of them would be exempt from a prosecution for libel. And yet they would constitute a statement made in the course of a public proceeding, in the same sense as the dying speech of the culprit. Both are customary and usual concomitants of a capital execution, but neither of them have, in my judgment, any such connection with it as to be within the purview of the act under consideration. The second section of the statute confirms this view of its intention. It declares that no libelous matter interspersed or connected with the report is within the privilege. This probably refers, primarily, to observations which might be added by the reporter, editor or other person concerned in the publication; but it would be equally within the language and spirit of the exception if made by another person at the time and place of the public proceedings, though it were not a portion of it, and were published with the actual proceedings. The common law had declared that the statements, speeches, &c., referred to in the statute, should be privileged, so that the persons whose duty or right it was to participate in such public discussions, might be perfectly free in the exercise of these rights and duties, and not under the restraint which it was supposed might embarrass them if they were liable to be called to account; but it was not so clear that everything which might lawfully be spoken or introduced in writing into public proceedings, could be safely printed and published afterwards. The Superior Court of the city of New York had in 1850 and 1851, decided, in conformity with the current of English authority, that the publication of *ex parte* proceedings before a public magistrate, such as a complaint against an individual for a criminal offence, was not privileged. (*Stanley v. Webb*, 4 Sandf. S. C. R., 21; *Mathews v. Beach*, 5 Id., 256.) And it is well known that actions for libel had been sustained for publishing legislative documents printed pursuant to an order of the House of Commons. (*Stockdale v. Hansard*, 9 Adolph. & Ellis, 7.)

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The act was not intended to enlarge the class of privileged communications when originally made in courts and before public bodies. They were all embraced by the rules of the common law; and it was only the repetition of them by printing and publishing in public journals which was thought to be improperly restricted. To remedy this was the whole purpose of the statute; and it would extend its operation beyond its intention and beyond the public motives upon which we may presume that it was enacted to hold that it authorized the publication of matters which it was actionable to utter in the first instance.

The words of the statute, I think, show that it was not intended to have any reference to such a transaction as the execution of a criminal condemned to death. Some of the language, if read alone, is no doubt broad enough to embrace it. It is in one sense a public official proceeding; but so, in the same sense, is the leading to prison of, or locking the door upon, a culprit adjudged to confinement, by the initiatory or final process in a criminal case, or his discharge, and many other things connected with the public administration of the law, or of public affairs. It would scarcely answer to hold that the publication of everything which might be said on such an occasion, though by one of the actors in the proceeding, and though suggested by the bearing of the transaction upon him, would be privileged, however false it might be, and however injuriously it might reflect upon an absent person. I am persuaded that the transactions embraced in the purview of the statute are such as resemble judicial and legislative proceedings, such as the transactions of administrative boards in which the subjects dealt with are liable to be considered, deliberated upon, discussed and determined. It is to such proceedings only that the words statement, speech, argument or debate, used in the act can be sensibly applied. To apply them to an executive act to be performed by a single official person, and which admits of no debate or deliberation, would be a perversion of the scope and intention of this act. The maxim of construction expressed

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by the terms *nosciat a sociis*, seems to me to bear strongly upon the case.

Much which has already been said bears upon the position taken by the counsel for the defendant, that the publication was privileged by the common law. The statute was undoubtedly intended to embrace all these cases in which it was thought proper to protect publications connected with public proceedings. The want of legal connection between the words spoken, and the proceeding which was going forward at the same time and place, which has led me to the conclusion that the statute does not apply, shows that it is not within the reason upon which the common law rule is based. That rule assumes that the public may have a legitimate interest in being made acquainted with the proceedings of courts of justice and of legislative bodies. The free circulation of such intelligence is of vast advantage in every country, and particularly here, where all reforms in legal or administrative polity must proceed from the people at large. But neither the reason of the rule, nor, as I believe, the rule itself has any application to a proceeding in which, neither forensic debate, nor legislative or administrative deliberation or determination have any place. Where the proceeding is a mere act, with which neither oral nor written communications have anything more than an accidental or fortuitous connection, there is no room for the application of the doctrine of privilege to whatever may be spoken or written at the time and place, when and where it is transpiring. Such transactions are subject to be reported, described and published in newspapers or otherwise, like other affairs in which individuals and communities feel a curiosity, and with the same liability attaching to the publisher to answer for any injury which may happen to the character of individuals if in the course of such publications libelous imputations are applied to any one. It is, of course, perfectly lawful to publish all the circumstances attending a public execution, including the dying speech of the malefactor; but it is a necessary condition of that right that if scandalous imputations are used by the culprit or any one else which are untrue, he who pub-

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lishes them afterwards must be responsible for the wrong and injury thereby occasioned to the person attacked. This determination will not unreasonably abridge the privileges of the conductors of public journals. They are left free to spread before the public all the revolting details of those unseemly transactions, as their taste or sense of propriety may dictate, subject only to the condition that they shall strike out all false and scandalous imputations upon others, or answer in damages to the party injured if they do not. If it should be said that the haste with which they are obliged to publish, leaves them no time to inquire as to the facts, it is not exacting too much to require them to postpone the publication of the libelous portions of the account until a proper investigation into their truth can be made.

I am in favor of affirming the judgment of the Supreme Court.

MASON, J., delivered an opinion to the same effect. He laid some stress upon the provisions of law requiring capital executions to be within the walls of the prison, or an adjoining enclosure, and excluding all spectators, with limited exceptions, as indicating a legislative policy adverse to the publicity of what passes on such occasions. All the judges concurring, except SELDEN, J., who was not present at the determination.

Judgment affirmed.

FOSTER *et al.* v. JULIEN.

Where the maker of a promissory note within this State removes therefrom, and continues to reside abroad until its maturity, the indorser may be charged without a demand of such maker or presentment at his last place of residence within this State.

APPEAL from the Supreme Court. Action upon a promissory note made by one George Vanden, payable to the order

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of the defendant, and by him indorsed. The note was dated at New York, where the maker resided at the time, and the indorser resided in the same city. The note was dated May 8, 1855, and had three months to run. About the middle of June following, the maker removed to the State of New Jersey, and continued to reside there until September 24th, 1855. The note fell due August 6th, and was protested, and notice of protest duly given to the defendant. From the facts found by Judge WHITING, before whom the cause was tried without jury, it appeared that the Notary, on the day the note fell due, made inquiry for the maker at the post-office in the city of New York and, to ascertain his residence, examined the city directory; but the maker's residence, on such inquiry, could not be found. The judge upon these facts, found, as a question of law, that the removal of the maker from the State of New York into the State of New Jersey, and his continued residence therein up to the maturity of the note, dispensed with the necessity of the demand upon him. The judgment for the plaintiff, ordered by Judge WHITING, was affirmed at general term, in the first district, and the defendant appealed to this court.

Henry A. Morange, for the appellant.

John H. Reynolds, for the respondent.

DAVIES, J. The only question presented for consideration is, whether the change of residence of the maker from the State of New York to the State of New Jersey, intermediate the date of the note and its maturity, dispensed with the necessity of presenting the note at the last place of residence of the maker in this State, and demanding payment thereof there. It is not contended that the holder was bound to seek out the maker, or his place of residence in the State to which he had removed, for the purpose of presenting the note and demanding payment. But it is urged that the holder should have sought the last place of residence of the maker in this State,

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and made the presentation and demand there. The Supreme Court of this State, in *Anderson v. Drake* (14 Johns., 114), say they had then (in 1817), in a late Case not reported, decided, when the drawer of a note had removed to Canada—the note being dated and drawn in Albany, though not made payable at any particular place in that city—that a demand in Albany was sufficient to charge the indorser. It is not stated where the demand in that case was made in Albany, and it is not seen upon the facts stated, how it could have been made, nor is any reason given for making it. It was decided in *Anderson v. Drake (supra)*, that when a note is not made payable at any particular place, and the maker has a known and permanent residence within the State, the holder is bound to make a demand at such residence in order to charge the indorser. The general rule is, that the holder of a note, who seeks to charge the indorser, must demand payment of the note at its maturity of the maker, at his place of business or residence. If the note is payable at a particular place, the demand must be made at the appointed place. The holder must use all reasonable and proper diligence to find the maker, where no particular place of payment is appointed in the note. And the case of *Anderson v. Drake (supra)*, established the rule, that where a change of residence of the maker took place between the making of the note and its maturity, and no place was appointed in the note for its presentment, the demand of payment must be made of the maker at his place of residence at the maturity of the note, provided such residence was within this State. *Taylor v. Snyder* (3 Denio, 145), was an action upon a note dated at Troy, in this State, the maker residing in Florida at the time of making the note, and at its maturity. No intermediate change of residence took place. The payment of the note was demanded of the defendant, the indorsee thereon, at Troy, and on refusal it was protested and notice given. BEARDSLEY, J., reviews ably and elaborately all the cases, when the presentment of the note for payment has been excused and classifies the exceptions to the general rule, requiring presentment and demand to charge the indorser, and shows they all

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rest on peculiar reasons. He says, in one the maker has absconded, in another he is temporarily absent, and has no domicile or place of business within the State; in a third his residence, if any, cannot be ascertained; while in the fourth he has removed out of the State, and taken up his residence in another country. In each of these instances let it be observed, the fact constituting the excuse occurs subsequently to the making and indorsement of the note, and it is this new and changed condition of the maker, and that only, by which the indorsee stands committed without a regular demand." In *McGruder v. Bank of Washington* (9 Wheat., 598), the Supreme Court of the United States, say, in reference to a change of residence to a foreign country or another State, "the reason and convenience are in favor of sustaining the doctrine that such a removal is an excuse from actual demand. Precision and certainty are often of more importance to the rules of law than their abstract justice. On this point there is no other rule that can be laid down, which will not leave too much latitude as to place and distance. Besides which it is consistent with analogy to both cases, that the indorser should stand committed in this respect, by the conduct of the maker. For his absconding or removal out of the kingdom, the indorser is held, in England to stand committed."

It is thus seen that the controlling element, which is introduced to establish the indorser's liability, is the change of condition after the making of the note. It is this change which commits the indorser, and excuses the presentment and demand of the bill. In this State, the rule has been regarded as well settled, since the decision of the case of *Anderson v. Drake*, that a removal of the maker out of the State, after the making of the note and before its maturity, excuses the holder from presentment and demand. It is true, that the court say that in the case of the removal of the maker of the note to Canada, intermediate its making and maturity where the note was dated at Albany, a demand in Albany was held sufficient to charge the indorsee. Yet it is not stated when the demand in Albany, in that case was made, or if the court

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deemed the fact of a demand essential. The principle of the case was that the removal of the maker excused presentment and demand, and the Canada case was decided in harmony with that principle, and it was not necessary to the case, or to render the decision in conformity with the previous cases, to advert to the fact that a demand of payment of the note, if any was made, was made in Albany. It was not relied on or adverted to that such demand was made at any particular place, and no reason is suggested why it should have been made at all, or that its being made was regarded as a material circumstance. The Canada case is certainly no authority for the position of the defendant, that the demand should have been made at the late place of business or residence of the maker in this State. BEARDSLEY, J., in *Taylor v. Snyder (supra)*, says, "that there is a further exception to the rule requiring a demand to be made of the maker or at his domicile or place of business, for where a note is made by a resident of the State, who, before it is payable, removes from the State, and takes up a permanent residence elsewhere, the holder need not follow him to make demand, *but it is sufficient to present the note for payment at the former place of residence of the maker.*" I have looked at all the authorities referred to in support of this position, and they fail entirely to sustain the point in the terms stated, and furnish no authority for the qualification that it is sufficient to present the note for payment at the former place of business of the maker. The learned judge was misled by the headnote to the case in 9th Wheaton (*supra*), which is in these words: "Where the maker of the note has removed into another State or another jurisdiction, subsequent to the making of the note, a personal demand on him is not necessary to charge the indorser, *but it is sufficient to present the note at the former place of residence of the maker.*" There is nothing in the case to warrant the qualification or suggestion in the headnote, relative to presenting the note at the former place of residence of the maker. It has long been well settled that a personal presentment of the note to the maker is not necessary to charge the indorser, neither will a presentment alone of the note suffice

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to charge the indorser: there must be a demand of payment and refusal. But no case which I have met with requires that the presentment and demand should be personal to and of the maker. A demand of payment at the place of business or residence of the maker was sufficient, and a refusal by any one there was all that was required. In *Cromwell v. Hynson* (2 Esp., 511), it was held that the presentation of the bill to the wife at the party's house, he being the master of a ship and absent from England, was a sufficient demand. (See, also, 2 Taun., 206.) The facts as admitted in *McGruder v. The Bank of Washington* (*supra*), were, that at the maturity of the note, neither the holder nor the notary knew of the removal from the District of Columbia of the maker, who resided there at the date of the note. Ten days before its maturity he removed out of the District to the State of Maryland, nine miles distant from his previous residence. At its maturity the note was delivered to a notary, who went with it to the house of the maker, where he last resided, and from which he had removed, in order there to present the note and demand payment, and not finding him there, and being ignorant of his place of residence, returned the said note under protest. Thus it is not alleged that the Notary presented the note at the last place of residence of the maker in the District, or that he demanded payment of it from any one. And the court in its opinion, does not advert to the fact that the Notary went with the note to the maker's last place of residence, or intimate that he should have done so, and there presented it and demanded payment. But the court distinctly places its decision upon the fact that the removal of the maker after the date of the note and before its maturity out of the District into one of the States, being in another jurisdiction absolved the holder from the necessity of presentation and demand of payment, and held the indorser duly charged, though neither was done. The court gave no intimation that the note had been presented at the maker's last place of residence, or that that fact was regarded as at all material.

The next case referred to by Justice BEARDSLEY is that of *Anderson v. Drake* (*supra*), in which no such point arose or is

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referred to. The only allusion to it is the remark made in relation to the Canada case, where it was said it was held that a demand in Albany was sufficient to charge the indorser. *Dennis v. Walker* (7 N. H., 199), did not present the point, but so far as it bears on the present case, is an authority to sustain the judgment in this case. There the maker of the note resided in Portsmouth at the date of the note, but at its maturity was at sea, his family still residing there, and there had been no change of his residence. The court held that his absence did not excuse presentment and demand at his residence to charge the indorser. UPHAM, J., says, "a removal without the bounds of the government after the making of a note, and before it becomes due, and where no place of payment of the note is specified, renders a demand upon the maker unnecessary; but this is an exception of the general rule, and must be construed strictly. Anything less than an actual change of residence by removal without the State would leave the rule too uncertain." The next case is that of *Gillespie v. Hannahan* (4 McCord R., 508). There the Notary made inquiry for the maker of the note in Charleston, where it was dated, and where the maker resided at the time it was made, but who had no residence at its maturity in Charleston, having in the meantime removed to Philadelphia. The Notary protested the note and gave notice to the indorser, without having made any presentment or demand. In an action against the indorser, the court held that where the maker had removed to another State, and resided there at the maturity of the note, the demand of payment was not necessary. The court say: "For all legal purposes a neighboring State, is regarded as a foreign country. Bills drawn on a sister State are regarded as foreign bills, and the terms 'beyond the seas', used in the statute of limitations, have in construction been applied to a neighboring State. I come to the conclusion that for the purposes of a demand on the maker of a promissory note, it must be so regarded; and that his absence from the State in which the note was made, and where it was understood it was to be paid, will excuse the holder from making a personal demand in order to charge the

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indorser." *Reid v. Morrison* (2 Watts & Serg., 401), I regard as an authority in point. There the court held that if the drawer of the bill, or maker of a note has absconded, that circumstance will dispense with the necessity of making any further inquiry after him. Citing Chitty on Bills, 261, Bayley on Bills, 95, in *Duncan v. McCullogh* (4 Serg. & Rawle, 480), the court say, "the same rule which exists in the case of absconding, applies to that of the removal of the maker or drawee into another jurisdiction after the execution of the instrument."

Gist v. Lybrand (3 Ohio, 307), is also a case in point. It was urged there that no inquiry was made at the last place of residence of the maker for payment, he having intermediate the date of the note and its maturity removed from the State. The court say, "we all concur in the opinion with the Supreme Court of the United States upon the first point in this case. In the case of *McGruder v. Bank of Washington*, cited by the plaintiffs' counsel, they have settled that the removal of the maker of a note after it was made and before its maturity, into a different State from that where he resided when the note was made, excuses the holder from making actual demand of payment from the maker. Whether a demand should be made at any other place is not made a point or adjudicated upon in that case. But it seems to us a clear consequence of the decision that such demand was unnecessary. The fact of removal commits the indorser and dispenses with all demand, unless a particular place be appointed for the payment of the note in the note itself."

I entirely concur in the views thus clearly expressed by the Supreme Court of Ohio. I think they correctly apprehended the exact force and extent of the decision of the Supreme Court of the United States, and that case should be followed as an authority. There would have been no misapprehension in reference to that case, if the headnote of the reporter had not interpolated a qualification to the rule enunciated not contained in the case or in the opinion of the court. This misapprehension undoubtedly led Mr. Justice BEARDSLEY into the qualification of the rule, otherwise correctly enunciated by

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him, and which rule was fully sustained by the authorities cited; but they do not sustain the qualification of the rule, it being only found in this headnote. The case in 9th Wheaton was decided in 1824, and I think the rule then laid down, was in harmony with previous adjudications in England and in this country, and as it establishes a uniform and reasonable and certain rule of commercial law, by the highest tribunal in the country, one not in conflict with our own decisions, I think we ought to recognize and adhere to it. This rule is approved by one of our most learned and able writers on the subject. (Edward on Bills, pp. 485, 486.)

I have been able to find but one case where a different rule has been announced. It is that of *Wheeler v. Field* (6 Met., 290). There the court held to charge an indorser upon a note dated in New York, where the maker had removed out of the State where it was made and dated, before its maturity, that a demand should have been made at the maker's last place of residence in New York, when he had removed to the State of Illinois. No authorities are cited for the opinion expressed, and no reasons are given why it should be recognized. It is certainly in direct conflict with those which have been already referred to, and it is not in harmony with the principles settled in numerous cases. We think it better to adhere to the long settled rule as laid down in the case in 9th Wheaton, even although cases might be supposed in which its application might by possibility work some wrong. It is of the highest importance in a commercial community that the rules relating to the presentment, demand and protest of notes and bills should be certain, and when once enunciated should be adhered to; and no reasons are suggested which we think should influence us to depart from or modify the rule as laid down by the United States Supreme Court in the case in 9th Wheaton. We think it a reasonable, just and proper rule, and one which should have universal application.

The judgment appealed from should be affirmed, with costs.

DENIO, LOTT, JAMES and HOYT, Js., concurred.

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MASON, J. (Dissenting.) Upon the facts of this case as found, the only question for review in this court is, whether where a note is made by a resident of this State without any place of payment designated, who, before the note is payable, removes from the State and takes up a permanent residence in another State, the holder of the note is bound to present it for payment at the last place of residence of the maker within the State in order to charge the indorser. The question has never been directly decided by the courts of this State, and it is proper therefore to look somewhat into the principles governing the law of commercial paper. Where a promissory note is not made payable at any particular place, the general rule of law is that, in order to charge the indorser, payment be demanded of the maker personally or at his dwelling-house, or other place of abode, or at his counting-house or place of business. (Story on Promissory Notes, § 235; *Bank of America v. Woodworth*, 18 J. R., 815; 19 Id., 391.) Though this is the general rule, yet a demand may be dispensed with entirely under particular circumstances. It is a question of due diligence, and if a demand is found to be impracticable, proper efforts for that purpose having been made, the indorser will still be held liable, due notice having been given to him by the holder. (3 Denio, 145.) Thus when the maker has absconded, that will ordinarily excuse a demand, and notice of the fact is sufficient to hold the indorser. (1 Ld. Raym., 448, 748; Chitty on Bills, 400, 401, 8th Am., from the 8th Lond. ed.; Story on Promissory Notes, § 237; 3 Kent's Com., 123, 6th ed.; *Putnam v. Sullivan*, 4 Mass. R., 45; 1 Watts & Serg., 126; 4 Serg. & Rawle, 483; 3 Denio, 154.) So when the maker is a seaman on a voyage, having no domicil in the State, the indorser is liable without a demand; and so indeed in every case where the maker has no known residence or place at which the note can be presented for payment, the indorser will be excused from making any demand whatever. (Story on Promissory Notes, § 237; *Whittier v. Graffam*, 8 Greenl. R., 82; *Putnam v. Sullivan*, 4 Mass. R., 53; *Duncan v. McCullough*, 4 Serg. & Rawle, 480; 3 Denio, 151.) In all these cases,

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however, the excuse for not making a demand must be shown on the trial of the cause. In all these cases it must appear that the maker had absconded, was at sea, or had no known domicile or place of residence where the note should be presented. The rule is strict that a demand must be made or a proper excuse shown for its omission. The rule seems to be very well settled, also, that if the maker of the note, subsequent to the making and before its maturity, has removed from the State, and become domiciled in another State, the holder need not follow him and make a demand there. (3 Kent's Com., 123, 8th ed.; 9 Wheat. R., 598; 18 J. R., 322; 7 N. H. R., 199; 4 McCord's R., 503; 2 Watts & Serg., 401; 3 Denio, 151; Edwards on Bills and Promissory Notes, 159.) But whether in such a case the holder is excused from presenting the note at the last place of residence of the maker in the State, does not seem to be very well settled. I feel constrained to say, after a careful examination of the question, and the best reflection which I have been able to bestow upon it, I think he must make the demand at the last place of residence of the maker within the State; and if he omit to do so, that the maker is discharged. I know that it is held that the holder is excused from making any demand when the maker had absconded. The cases, it seems to me, are not analogous. The law will not indulge in any presumption that where a man has absconded he has left funds at his last place of residence in the State to pay his notes. It seems to me, however, where a man removes from the State, after he has made a note, and before its maturity, knowing the law to be that the holder is under no legal obligation to follow him into the State of his changed domicile, that the law will indulge the presumption that he has saved his indorser from protest by leaving funds at the place where he knew the holder would have to present it if he had remained in the State, or where he might think it would be presented at maturity. The elementary writers upon this branch of the law, so far as I have been able to consult them, without exception, seem to regard the demand at the last place of residence of the maker in the State as necessary. At least it is fairly to

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be implied that they regard it as necessary from the manner in which they state the rule. Chancellor KENT states the rule, as follows: "If the maker of the note or acceptor of the bill has removed out of the State, subsequent to the making of the note, or accepting the bill, it is sufficient to present the same at his former place of residence." (3 Kent's Com., 180, 9th ed.) Edwards in his recent Treatise on Bills and Promissory Notes, page 159, states the rule in the same language. (Story on Bills of Exchange, § 852, 8d ed.; Chitty on Bills, pp. 412, 413, 12th Am. ed., from the 9th Lon. ed.) There are some of the judges in this State, certainly, who have assumed a demand to be necessary in such a case. It was so assumed by Chief Judge THOMPSON in *Anderson v. Drake* (14 J. R., 114). Judge BEARDSLEY assumes this to be the rule in delivering the opinion of the court in *Taylor v. Snyder* (8 Denio, 151), and so does Judge JEWETT in delivering the opinion of the court in the case of *Spies v. Gilmore*. (1 Comst., 326, 327). This distinct question was presented to the Supreme Court of Massachusetts in the case of *Wheeler v. Field* (6 Met. R., 290), and the court held that the holder was bound to demand payment at the maker's last place of residence or place of business within the State where he made the note, if he can find it by due diligence. This case deciding what I think was, by the understanding of the profession, the law on this subject, I think we should follow it. I am aware that the Supreme Court of Ohio in the case of *Gist v. Lybrand* (3 Ham. Ohio R., 319), has decided this question directly the other way. The case, however, seems to have been decided upon the strength of the authority of *McGruder v. The Bank of Washington* (9 Wheat. R., 598). In that case the note was presented at the last place of residence of the maker within the District of Columbia, and the only question really presented for decision was, whether the note was properly protested on the demand made at the last place of residence of the maker, and the court held that it was. I cannot but think that the Supreme Court of Pennsylvania fell into an error in the case of *Reid v. Morrison* (2 Watts & Serg., 401), where they say that the same rule which exists

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in the case of an absconding maker applies equally to that of the removal of the maker into another jurisdiction after the execution of the instrument. Now it seems to me that we have seen that the two cases are not analogous: that there are good reasons for holding a different rule in the latter case. If I am correct in the views above expressed, it follows that the judgments of both the general and special terms in this case should be reversed, and a new trial granted.

COMSTOCK, Ch. J., expressed no opinion; SELDEN, J., was absent.

Judgment affirmed.

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A promise is to be interpreted in that sense in which the promisor knew that the promisee understood it.

Accordingly where the vendor of land undertook to execute such a conveyance as he had received from his grantor, which he said was a warranty deed—the same in fact containing only a covenant against the acts of the grantor—the purchaser, although he saw the deed under which the vendor held, understood it to be, and understood the vendor to promise, a deed with general warranty, and the vendor knew that such was his understanding, *held*, that the vendor was bound to convey with general warranty.

Where the complaint prays for the specific performance of a contract to convey lands or for damages, but shows that the defendant is incapable of conveying, and the parties go to trial, the court, under the Code, is not to dismiss the complaint, but to retain the case for the purpose of awarding damages.

It is no ground for reversing the judgment in such a case that the trial was by the court without jury, where it does not appear in the case that the objection was taken at the trial.

APPEAL from the Supreme Court. The complaint set forth a contract for the conveyance by the defendant to the plaintiff of forty acres of land by a good warrantee deed. It averred

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that the defendant had tendered a deed which contained only a covenant of warranty against his own acts, which the plaintiff refused to receive: that the defendant had no title to the land, but that it was in the possession of a third person who held it adversely under a valid title. It prayed for a specific performance of the contract, or for damages. The defendant denied the contract to convey with general covenant of warranty. The trial was before a judge without jury. The Case did not show whether this was by consent, nor that any objection was taken to that mode of trial. The judge found the facts, as the same as sufficiently stated in the following opinion, and ordered judgment for the plaintiff for \$500 damages. The judgment having been reversed, and a new trial granted at general term in the sixth district, the plaintiff appealed to this court.

Benjamin N. Loomis, for the appellant.

Giles F. Hotchkiss, for the respondent.

LOTT, J. As the judgment of reversal and granting a new trial does not show that it was reversed on questions of fact, the case is open to review in this court on questions of law only (§ 268 of the Code, as amended in 1860). We must, therefore, assume the facts to be as stated in the decision of the judge; and the principal question to be considered is whether he decided correctly, as a conclusion of law, that the defendant is deemed to have promised the plaintiff that he would execute and deliver to him a good warranty deed of the forty acres of land situated at Binghamton, referred to in the pleadings. It is found expressly that the defendant had agreed to grant and convey the said land in fee to the plaintiff, and the finding in relation to the deed by which it was to be so granted and conveyed is, substantially, that during the negotiation between the parties, the defendant stated to the plaintiff that he had a warranty deed of the said lot, that such statement was made after he was informed by the defendant that he would not accept a quit-claim deed therefor, and that the agreement finally entered

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into was made under the belief by the plaintiff that he was to receive and the defendant had promised and was to give a good warranty deed: the defendant at the time knowing that the plaintiff was acting and entering into the agreement under such belief, without informing him of his mistake: but the defendant, in fact, "did not expressly promise or intend to promise or at any time to deliver to the plaintiff a good warranty deed of said forty acres of land, and did not at any time intend to give the plaintiff a warranty deed of that land."

The fair and legitimate inference from these facts is, that a mere naked conveyance of the lands without any covenants was not contemplated by either of the parties, and as no form was specifically and in terms agreed on, we are to determine from the nature and course of the negotiations what the plaintiff was entitled to.

His declaration, that he would not receive a quit-claim deed, followed by the statement of the defendant that he had a warranty deed is, in my opinion, sufficient, in the absence of proof of any other remark qualifying that statement, to warrant the belief by the plaintiff that the form of deed spoken of by the defendant would be given. It was his duty when he knew that the plaintiff was acting under that belief, to have informed him of his mistake; and his failure to do so, must be considered as an assent to do what the defendant understood he was contracting for. Good faith and fair dealing will not permit him to shield himself from such a consequence or liability on the ground that he did not expressly promise or intend to promise or give the deed which his conduct warranted the plaintiff in believing he would receive. It was his duty to speak, and it would be inconsistent with all idea of right and justice to permit a party to avail himself of the benefits accruing from a contract made under such circumstances and withhold from the other party the consideration which, with his knowledge, that party expected to receive in return. The transaction was for all practical purposes the same in effect as if the plaintiff had, in express terms, told the defendant that his understanding of the agreement was that he was to receive a good warranty

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deed, and that the defendant had made no response to that declaration. His silence under such circumstances would be an acquiescence, and would create a liability to the same extent as if he had given an express assent to the declaration.

I have so far considered the question upon the facts to which I have above particularly referred, and unless the circumstances to which I shall now refer are sufficient to overcome their effect, it appears to me clear that the defendant has bound himself to give the deed claimed by the plaintiff.

It is conceded by the defendant in his answer, that he was to convey the forty acres in question to the plaintiff, but he says that it was distinctly and expressly understood and agreed by and between the plaintiff and himself "that he was not to convey the same by a good warranty deed, but on the contrary that he was to execute to the plaintiff, and the plaintiff was to accept, a deed therefor like the deed by which the same was conveyed to him, and that this was the whole of the agreement between them in relation to the said forty acres."

It is found, as a part of the facts in the case, that the deed under which the defendant held these premises contained no covenants of warranty, except one against the acts of his grantors: that during the negotiations between the parties, the defendant stated to the plaintiff that he had a warranty deed of the land; that this deed was then shown to the plaintiff who took it and looked at it but did not discover that it contained no covenants of warranty, except one against the acts of his grantors. A deed copied therefrom to be executed and delivered by the defendant and wife to the plaintiff, was compared therewith in the presence and hearing of the plaintiff, who did not discover but that both of those deeds were common warranty deeds. It is further found that the defendant, when he stated to the plaintiff that he had such warranty deed for the land, knew that the only covenant contained therein was against the grantor's own acts only, but that the plaintiff believed it was a common warranty deed, and the defendant knew that the plaintiff so believed.

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These facts, in my opinion, do not materially change the character of the transaction, at all events not in favor of the defendant.

It is true that the plaintiff saw and looked at the deed that was shown him, and heard it read, but failed to notice that it was not such a deed as he believed, and as the defendant had represented it to be. These transactions, therefore, did not convey any actual knowledge of the true nature of the defendant's deed.

The situation of the defendant was far different. He not only knew that the deed was not such as he had stated it was, but he also knew that the plaintiff believed it was, in fact, a good warranty deed, and permitted him to enter into the agreement and in fact, as is found, saw him pay \$100 in part performance of it without informing him that he was acting under a mistake.

The material fact, therefore, still stands uncontradicted that the plaintiff made the agreement in question upon the belief and understanding that he was to receive a good warranty deed, but the fact is entitled to greater consideration from the circumstance that the defendant's representations, that the deed held by him was a warranty deed, were calculated to confirm, if not to induce the plaintiff's belief.

These considerations lead us to the conclusion that the defendant was bound to grant and convey the premises in question to the plaintiff in fee by a good warranty deed.

This conclusion is in accordance with right and justice, and is sustained in principle by authority. (Story on Contracts, §§ 13 and 18a; *Wiswall v. Hall*, 3 Paige, 318; *De Peyster v. Hasbrouck*, 1 Kern., 588, 590; *Alexander v. Vane*, 1 Mees. & Wels., 511.) The defendant has failed and refused to comply with that obligation. Not only is the deed tendered insufficient in form, but it also is found that at the time it was tendered the premises were in possession of another party; and that the same were then, and since have been, held and occupied by such party under deed thereof, and claiming title there-to adversely to the title of the defendant and those under

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whom he claims. His deed, therefore, would be void as against the party claiming adversely, and would not confer the right of possession or any title under which possession could be recovered: and the court properly refused to give judgment directing a conveyance.

It is, therefore, a case where the plaintiff is entitled to damages for the non-performance of the agreement, and the remaining question to be considered is whether they are recoverable in this action. The complaint is framed for the specific performance of the agreement, and in default thereof for compensation in damages. It, after setting forth the terms of the contract sought to be enforced, alleges that the plaintiff has no valid title or interest in the land in question, and that the same is in the possession of another party, holding the same under a good and valid title. It was, therefore, a case where the facts alleged were not sufficient to justify a decree for specific performance, and it may be conceded, as stated in the opinion of the court below, to have been a well settled rule under our former judicial system, that a court of equity, where such relief only is attainable, would not have retained the suit for the purpose of awarding a compensation in damages, for the non-performance of the contract to convey; for the reason that actions for damages only were properly cognizable in courts of law, in which a perfect remedy could be had. Under our present arrangement the same court has both legal and equitable jurisdiction, and if the facts stated by a party in his complaint are sufficient to entitle him to any of the relief asked, and an answer is put in putting these facts in issue, it would be erroneous to dismiss the complaint on the trial merely because improper relief is primarily demanded. It is competent for the court, under such circumstances, to grant any relief consistent with the case made by the complaint and embraced within the issue (section 275 of the Code) and the statement of the right of the plaintiff and its infringement by a defendant constitute such case as stated by JOHNSON, J., in *Marquat v. Marquat* (2 Kern., 333, 341); *Phillips v. Gorham* (17 N. Y., 270); *Truscott v. King* (2 Seld., 165); *Wiswall v. Hall* (3 Paige, 314);

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Le Roy v. Platt (4 Id., 77); *The New York Insurance Company v. North Western Gas Company* (21 How. Pr. R., 296, 298). These are the only questions properly presented on the appeal.

It is, however, insisted by the defendant, that it was erroneous for the court to order judgment in favor of the plaintiff on a trial of the issue without a jury. There is nothing in the case to show that the action was so tried against or without the defendant's consent. The objection does not appear to have been made at the trial, and if it was, the fact should have been stated in the case, and not appearing there it cannot be urged in this court as a ground for reversing the judgment *Greason v. Keteltas* (17 N. Y., 491).

The result of these views is that the judgment of the general term should be reversed and that of the special term affirmed, with costs, in the Supreme Court, but without costs to either party on this appeal.

COMSTOCK, Ch. J., delivered an opinion to the same effect; DENIO, DAVIES and JAMES, Js., concurred; HOYT, J., was for reversal and ordering a new trial; MASON, J., for affirming the judgment at general term; SELDEN, J., did not sit in the case.

Judgment at general term reversed, and that at special term affirmed.

24	48
157	426

24	46
167	344

SIPPERLY v. BAUCUS et al.

The effect of the repeal in 1837 (ch. 460, § 71), of the restrictive clause in respect to the jurisdiction of surrogates' courts (2 R. S., p. 221, § 1), is to restore to such courts the incidental powers possessed by them previous to the Revised Statutes.

A surrogate has the power to open a decree made by him on the final accounting of an administrator, and to require a further account in respect to a sum received by him with which he had charged himself, as \$14.80 instead of \$1,480.

There is no positive limitation of the period in which such application may be made, and the lapse of four years does not of itself import laches.

Sipperly v. Bancus.

APPEAL from an order of the Supreme Court, at a general term, reversing an order of the Surrogate of Saratoga county, by which the surrogate opened his decree, made on final accounting by the administrators of the estate of Martin M. Stover, so far as concerned the respondent, Sipperly, and directed him to render a further account.

The facts were these: Martin M. Stover died intestate in June, 1849, and in July of the same year, Martin Sipperly, Jacob A. Snyder and Elizabeth M. Stover, were appointed administrators of his estate. In April, 1851, the administrators petitioned for a final account, which was had, and after hearing the proofs, a final decree was entered by the surrogate in September of that year, and an order made in December, distributing the estate. In September, 1855, the appellants, upon allegation of error in the accounting, petitioned the surrogate, praying that the decree might be opened as to the respondent, and he be charged with the error amounting to over \$1,400. It was made conclusively to appear that the sum of \$1,480, received by the respondent, as administrator, was accounted for as \$14.80.

John H. Reynolds, for the appellant.

William A. Beach, for the respondent.

JAMES, J. The questions presented by the case for consideration, are, 1st. The power of the surrogate to open the decree; 2d. Whether or not the application was in time.

Before the adoption of the Revised Statutes, the powers and jurisdiction of surrogates' courts were undefined, the laws respecting them and the subjects of their cognizance were defective, ambiguous and irreconcilable, and the practice and decisions uncertain and contradictory. The Revisers of our Statutes undertook to provide a remedy for those evils by accurately and strictly defining the purposes and ends of the court, and the objects and extent of its authority. To that end the first section of the Revised Statutes relative to surrogates'

Slippery c. Bancus.

courts declared as follows: "which powers shall be exercised in the cases, and in the manner prescribed by the statutes of this State, and in no other; and no surrogate shall, under any pretext of incidental power or constructive authority, exercise any jurisdiction whatever, not expressly given by some statute of this State." (2 R. S., 221.) A few years' experience demonstrated that the limited and precise terms of the above statute were incompatible with, and inadequate to, the business necessities of the court. As was said by Chancellor WALWORTH, in *Pew v. Hastings* (1 Barb. Ch. R., 454), "it was found that the exercise of certain incidental powers by courts, was absolutely essential to the due administration of justice; and that the Revisers and the Legislature had not, by their care and foresight, been able to take the case of these surrogates' courts out of the operation of the general rule. Accordingly the Legislature, in 1837, repealed the restrictive part of the foregoing clause of the Revised Statutes. (Laws of 1837, p. 531.) Since that repeal surrogates' courts have continually exercised powers not enumerated in the statutes, and there are several reported cases sustaining and commending such acts. In *Vredenburg v. Calf* (9 Paige, 128), decided since the repeal of the prohibitory provisions of the Revised Statutes, it was held that where an order had been entered which the surrogate had no power to enter, he not only had the right, but it was his duty to set it aside as irregular. In *Skidmore v. Davies* (10 Paige, 316), it was expressly stated that the remedy of a party aggrieved by an irregular *ex parte* order made by a surrogate was to apply to the surrogate to vacate or set it aside, and not by appeal. To the same effect is the case of *Proctor v. Wanmaker* (1 Barb. Ch. R., 302). *Pew v. Hastings* (*supra*), is a still stronger case. Upon a day set for accounting, through mistake no one appeared to oppose, and the accounting was had *ex parte*. After decree entered, application was made to open the default and the sentence and decree founded thereon, that the legatees might come in and contest the averments. The motion was denied by the surrogate on the ground that he had no right or jurisdiction to open a regu-

lar default, or decree, and to let the parties in to be heard upon the merits. On appeal the Chancellor reversed the order and held that the surrogate had the power to open the decree, and that such a power was absolutely essential to the due administration of justice. In another case, it was held that if an order was made at a particular time, which was then authorized, the surrogate had a right afterwards to enter it *nunc pro tunc*. (*Butler v. Emmett*, 8 Paige, 12, 21.) Except when restricted by the terms of the statute, surrogates' courts now possess substantially the same powers as before the Revised Statutes, the effect of the amendment of 1837 having been to restore to them the powers which were incidental and necessary to the proper discharge of the duties conferred upon them. Although wherever the statute speaks it must be followed and obeyed, yet when a proper occasion arises to invoke the incidental power of the court, the surrogate should not decline the exercise of the power because the statute is silent on the subject. As a question of incidental power the court was fully authorized to open the decree in this case, unless such accounting is made final and conclusive by some statute. The only statute bearing upon the question declares that the final settlement of an account, and the allowance thereof by the surrogate, &c., shall be conclusive evidence against all creditors, legatees, next of kin of the deceased, and all persons in any way interested in the estate, upon whom the citation shall have been served, &c., of certain specified facts, and of no others, as follows: 1st. That the charges made in such account for moneys paid to creditors, to legatees, to the next of kin, and for necessary expenses, are correct; 2d. That such executor or administrator has been charged all the interest for moneys received by him and embraced in his account, for which he was legally accountable; 3d. That the moneys stated in such account as collected, were all that was collectible on the debts stated in such account at the time of the settlement thereof; 4th. That the allowances in such account for the decrease of the value of any assets, and the charges therein for the increase in such value, were correctly made." The object of this statute was to make

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certain things therein specified final; the error complained of in this case is not of any matter included within the specifications of the above section, and the question before us is in no way embarrassed by it. I am, therefore, of the opinion that the decree in this case was not such a final adjudication as to divest the surrogate of control over it.

The next and only other question is, did the application to open the decree come too late. It had stood over four years. It was held in *Rogers v. Rogers* (1 Paige, 188), that "a delay of a year and six months in applying to the Chancellor to correct a mistake made in drawing up a decree was too long, and leave was refused. In that case the complainants were apprized of the supposed mistake in the decree when the objections were made to the draft of the Master's report, and by the exceptions to the report and the argument of those exceptions. Of course it was the duty of the complainants to have immediately applied, and by a delay of eighteen months they were properly charged with laches; but in the present case there is nothing to show when the alleged error was discovered. For aught we can know, the application in the case may have been promptly made on discovery of the error. There is no positive limitation of the period in which such an application may be made, and in the absence of laches, we cannot say, as a matter of law, that the application was not in time.

We think the application was, so far as appears to this court, made in time: that the surrogate had jurisdiction to entertain it, and power to grant the order; and that he did right in so doing.

The order of the general term is reversed, and that of the surrogate affirmed, with costs.

All the judges concurring,

Ordered accordingly.

Orser v. Orser.

ORSER *et al.* v. ORSER, Executor, &c.

The certificate of attestation to a will by a deceased witness is not, it seems, equivalent to his testimony, if he were living, to the contents thereof, but is evidence of an inferior nature.

Such an attestation, in connection with the other circumstances of the case, may warrant a jury in finding the due execution of the will against the evidence of the other subscribing witness; but would not, it seems, without regard to any extrinsic fact, support such a verdict against the positive testimony of a living witness.

No distinction exists between the force of the certificate, as evidence of what was done and heard by the deceased witness, and of what it states to have been also witnessed by the survivor.

APPEAL from the Supreme Court. The surrogate of Westchester county admitted to probate a paper purporting to be the last will of Edward Orser. Upon appeal from the decree of the surrogate to the Supreme Court, issues were framed and sent for trial by jury, to the Westchester Circuit. There was an attestation to the will, stating all the particulars requisite to its valid execution and publication, and subscribed by two witnesses. One of them, Charles Yoe, had died before the trial, and his signature was proved. The body of the instrument was shown to be in the handwriting of this witness. It also appeared that he was a justice of the peace, and had been accustomed to draft and to attest the execution of testamentary papers. The other witness, Ward Acker, was examined at the trial. He could not remember that the decedent declared the instrument to be his will or acknowledged his signature, which was appended previous to his being called upon by the other witness to sign the attestation clause. This witness denied that he heard the decedent speak of the paper as his will, but admitted that he heard some conversation between the decedent and the other witness which he could not remember. The jury, under the charge of the judge, found against the execution and publication of the will. The exceptions taken upon the trial are sufficiently stated in the following opinion. The

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exceptions were heard at general term in the second district, and judgment rendered that the will was not duly executed. The proponents appealed to this court.

Samuel E. Lyon, for the appellants.

Amasa J. Parker, for the respondent.

SELDEN, J. The result of the authorities upon the probate of wills is, that the question of the due execution of a will is to be determined, like any other fact, in view of all the legitimate evidence in the case; and that no controlling effect is to be given to the testimony of the subscribing witnesses. Their direct participation in the transaction must, of course, give great weight to their testimony; but it is liable to be rebutted by other evidence, either direct or circumstantial. A will, duly attested upon its face, the signatures to which are all genuine, may be admitted to probate, although none of the subscribing witnesses are able to swear, from recollection, that the formalities required by the statute were complied with; and even although some of them should swear positively that they were not, if the other evidence warrants the inference that they were. It might be difficult, though, I think, not impossible, to establish the will if all the subscribing witnesses should state positively that the statutory requisites were not observed. But, however this may be, the authorities are abundant to show that, where testimony favorable to the due execution of the will is derived from some or one of those who subscribed it as witnesses, it becomes a mere question as to the relative weight of the evidence, whatever may be the testimony of the others. (*Jauncey v. Thorne*, 2 Barb. Ch., 40, and cases there cited.)

In the present case there were two witnesses, one of whom was dead, and the other testified upon the trial that the will was not signed, or the signature thereto acknowledged, in his presence, and that it was not declared by the testator to be his will. He further stated that there was conversation between

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the testator and the deceased witness which he could not remember; but he was sure that nothing was said in that conversation about the will. The certificate of attestation was full, and showed, if true, a perfect compliance with the provisions of the statute; and the signatures of the testator and the deceased witness, Yoe, were shown to be genuine. It appeared that Mr. Yoe was in the habit of drawing wills, and was familiar with the requisites essential to their due execution, and that the certificate was in his handwriting. On the other hand, Mr. Acker, the witness who was sworn, had never before been called upon to witness a will, and knew nothing of the formalities required.

Under these circumstances there can, I apprehend, be no doubt that a jury would be at liberty to find that the will was duly executed. The statute (2 R. S., p. 58, § 18), provides that, when one or more of the subscribing witnesses are dead, and the others are examined, proof may be taken of the handwriting of the testator and of the witnesses who are dead, and also of other circumstances tending to prove the will. The effect of this provision, of course, is to make the certificate of attestation, signed by the deceased witness, evidence to some extent of the facts stated in it. The force of this evidence will depend very much upon the circumstances of the case. If the witness whose signature is thus proved is shown to have been an uneducated man, not accustomed to subscribe wills, and ignorant of the legal requisites to their due execution, the evidence afforded by proof of his handwriting of a strict compliance with the requirements of the statute would be very slight. On the contrary, if the witness was in the habit of drawing and attending to the execution of wills, and familiar with the law upon the subject, his certificate that the requisite formalities were duly observed would be entitled to great weight. The evidence which such a certificate would afford would, in most cases, be sufficient to overcome the mere want of recollection of a living witness; and should the testimony of the latter amount to a positive denial, the relative weight of the conflicting proof would then depend upon the apparent integ-

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rity and intelligence of the witness and the circumstances surrounding the particular case. The questions in the present case arise upon the charge of the judge; and if, upon examination, he is found to have given to the jury instructions which conflict with these principles, the judgment must be reversed.

Were it sufficient to reverse the judgment that we should be able to see, from the charge and the refusals to charge, taken together as a whole, that the judge entertained erroneous views in regard to the effect of the evidence, and that he probably communicated those views to the jury, there would, perhaps, be little difficulty in disposing of the case. But it is necessary that some specific error should be pointed out, either in the instructions actually given or in those which the judge refused to give to the jury.

The counsel requested him to charge, that although the surviving witness, Acker, had sworn that the testator did not acknowledge the signature to the will, or comply with the other requisitions of the statute, the jury had, nevertheless, a right to find the fact, that he did make such acknowledgment "from the evidence supplied by the certificate of attestation." This request was refused, and the counsel excepted.

Had the words, "and from the other circumstances proved in the case," been added to the proposition, the judge would, I think, have been bound to accede to the request. Perhaps the proposition does impliedly include the addition suggested. Still, it is capable of being understood as intended to assert, that the certificate of attestation alone, without regard to any extrinsic fact or circumstance, would be sufficient to authorize the jury to find against the positive testimony of a living witness. From other parts of the judge's charge, it would seem that he must so have understood it; and when thus interpreted, I am not prepared to say that his refusal was erroneous.

One of the propositions which the judge was called upon to charge was, that the jury might find the due execution of the will, against the positive testimony of Acker, if they believed the certificate of attestation true. To this the judge

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acceded, and so charged, provided "there were facts and circumstances disclosed to warrant that belief." I see nothing erroneous in this qualification. Without it, I doubt the soundness of the proposition.

Another proposition was, that the certificate of attestation, signed by Mr. Yoe, "is equivalent to his testimony, if he were living, and testified to the contents of it before the jury." The judge charged in favor of this, "so far only as relates to Yoe himself." The distinction here taken by the judge is clearly unfounded; and the charge, in this respect, would be erroneous if the proposition itself were sound. But it is clear, that the certificate of attestation is not equivalent to the testimony of the living witness. If equivalent, it should have equal weight as against conflicting testimony; a force which cannot reasonably be attributed to it. The statute makes it evidence; but it is evidence of a secondary and inferior nature, which is received from the necessity of the case. The counsel, therefore, has no right to complain of this portion of the charge, as it conceded more than he was entitled to.

But there is another portion of the charge which it is difficult to support. The judge was requested to instruct the jury, that as the witness, Acker, had sworn that words had passed between Yoe and the testator at the time of the execution of the will, which he, Acker, did not remember, the jury might infer from this testimony, taken in connection with the certificate of attestation, and the other facts found in the case, that these words contained the necessary acknowledgment, and request, by the testator. The judge charged in favor of this proposition, "so far as relates to Yoe, but not as it relates to Acker." There is no ground for the distinction here made by the judge. So far as the certificate was evidence at all, it furnished as much proof that the will was executed in presence of Acker as of Yoe. It certifies, "that the instrument was declared to *us* by the testator," &c.; and that he "acknowledged to *each of us* that he had subscribed the same, and *we*, at his request, signed *our* names," &c. If, therefore, the proposition itself was sound, the charge was of course erroneous.

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I cannot doubt that the jury were at liberty to find, if they believed such to be the fact, that the necessary requests and acknowledgments, on the part of the testator, constituted a part of the conversation between him and Mr. Yoe, which the witness, Acker, could not recollect. It is true that Acker testified to the contrary. But there is a seeming inconsistency on the part of the witness in saying, that he could not recollect what the conversation was, but could recollect what it was not. Besides, the witness says he went into Mr. Yoe's office at his request, to witness this will. He had no other business there, and staid only long enough to sign his name to the paper. The execution of the will was, obviously, from his own relation, the business upon which they were all intent; and yet, he says the conversation between Yoe and the testator had no relation to the will. This seems to me not very probable; and I should certainly think it a not unreasonable inference that the witness, Acker, was mistaken in his recollection upon that point. The request under consideration, therefore, was, I think, a proper one; and the judge should have charged according to its terms. This point was not specially urged by the counsel upon the argument; but the exception was taken at the time, and I did not understand it to be waived. For the error of the judge, in not charging as requested in this respect, the judgment should be reversed, and there should be a new trial, with costs to abide the event.

COMSTOCK, Ch. J., DENIO, DAVIES and JAMES, Js., concurred; LOTT, MASON and HOYT, Js., dissented.

Judgment reversed, and new trial ordered.

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24	57
110	410

DYKERS *et al.* v. TOWNSEND.

A subscription by the agent of the party to be charged is sufficient under the statute of frauds, though the name or existence of a principal does not appear upon the instrument.

To avoid a contract as against the stock-jobbing act (1 R. S., p. 710, § 6), the burden of proof is upon the party alleging a violation.

Stebbins v. Leowolf (3 Cush., 143), overruled on this point.

In an action by the vendor of stocks against a vendee refusing to perform his contract to purchase, it was a defence that the vendor did not own, nor was authorized to sell, sufficient stock to fulfill the contract in suit and his previous outstanding contracts. But evidence falling short of this, as merely showing contracts sufficient to absorb all the stock which the plaintiff had *proved* himself to own, is inadmissible.

APPEAL from the Supreme Court. Action to recover damages for the failure of the defendant to receive and pay for one thousand one hundred shares of the capital stock of the New York and Erie Railroad Company, in performance of three several contracts therefor, bearing date the 2d and 30th May, and 5th June, 1854, one of which was in the following form:

"NEW YORK, May 2, 1854.

"I have purchased of Dykers, Alstine & Co., five hundred (500) shares of the stock of the N. Y. and Erie Railroad Co., at seventy-one (71) per cent, and deliverable in sixty days, buyer's option, with interest at the rate of six per cent per annum.

"W. S. HOYT."

The others were in the same form except that one of them was signed by one Brown. It was alleged and proved, under objections made by the defendant, that Hoyt and Brown were brokers, and acted as the agents of the defendant in making the contracts: that they had authority from the defendant to make the purchases, and so informed the plaintiffs when the contracts were made. The defendant was advised by the brokers of each contract when it was made.

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The plaintiffs proved that at the date of the several contracts, they were possessed of more than a sufficient number of shares of the stock to satisfy the contracts respectively, and that they were possessed of such stock until after the maturity of the contracts.

When the plaintiffs rested, the defendant moved to dismiss the complaint on the ground that the contracts were signed by Brown and Hoyt, in their own names, and that the name of the defendant nowhere appeared upon them: that parol evidence could not be introduced to show that the defendant was the person for whose benefit the contracts were made; and that the plaintiffs had not shown any valid contract between themselves and the defendant. The motion was denied, and the defendant took an exception.

The defendant then offered to prove, for the purpose of showing the contract void under the stock-jobbing act (since repealed), that, at the date of the several memoranda of sale, the plaintiffs had other contracts made by them then outstanding for the sale and delivery, at buyer's option, as to time, of a larger number of shares of the stock of the New York and Erie Railroad Company than they had proved themselves to be possessed of, as before stated, and also that they held as trustees for others (though standing in their own name), and under agreement to hold the same without sale, a number of shares of said stock exceeding that which they had proved to be in their possession. The evidence was rejected, and the defendant took an exception. The plaintiffs had a verdict for \$20,214.42. Judgment thereon having been rendered at general term in the first district, the defendant appealed to this court.

Charles O'Connor, for the appellants.

Greene C. Bronson, for the respondent.

HOYT, J. The statute of frauds (2 R. S., p. 136, § 3), declares that every contract for the sale of goods and chattels, or things in action for the price of fifty dollars or more, shall

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be void unless a note or memorandum of such contract be made in writing, and subscribed by the party, to be charged thereby. As an original question I should have no hesitation in saying, in a case where the contract was entirely executory on both sides, and no part of the consideration had been paid, that it was necessary that it should be in writing under this statute, and be signed by both parties thereto, or their agents, in order to be binding upon either; or, in other words, there being no consideration paid, the promise of one party would be the consideration for the promise of the other, and that both must be in writing to charge either. There is a distinction between this provision and section 8 of 2 Revised Statutes, 135, relating to contracts for the sale of land. There the contract is only required to be signed by the party by whom the sale is to be made (1 Seld., 244). In the case of a contract for the sale of goods, I should say the party to be charged means the vendor upon his contract to sell, and the vendee upon his contract to accept and pay for the goods. But this question does not appear to have been directly raised upon the trial: if it had been it might perhaps have been obviated by the production of a counterpart of the contract signed by the plaintiffs. As there are several authorities which seemingly, at least, give a different construction to this and similar provisions in the former statute of frauds, I do not propose further to discuss the question at this time. (*Russell v. Nicol*, 3 Wend., 118 [1 R. L., p. 79, § 15]; 3 J. R., 418; 7 Ves., 265; 3 John. Cas., 60; 2 Caines, 117; 14 J. R., 487; 2 Bos. & Pull., 288; 6 East., 807; 26 Wend., 841.)

It is declared by section 8 of 2 Revised Statutes, 136, that every instrument, required by that title to be subscribed by any party, may be subscribed by the lawful agent of such party. The Supreme Court held that the subscription to the contract, by the agent of the defendant, was a compliance with the statute, although the name of his principal did not appear upon the instrument.

It is clear, that the authority of the agent in such a case need not be in writing; and a verbal contract of sale would

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be entirely valid, were it not for this statute. If the price of the goods agreed to be sold is less than fifty dollars, no writing is necessary. To this extent the legislature have deemed it prudent to leave the fact of the making of a contract, and of its terms, to the recollection of witnesses. So, whatever may be the value of the goods agreed to be sold, where any part of them has been delivered, or any part of the purchase-money has been paid, this is clear evidence that a contract was consummated between the parties; and the legislature have thought it safe to leave the details and terms thereof to the recollection of witnesses. But to guard against fraud and perjuries, as well as against mistakes and misrecollection of witnesses as to a contract having been consummated between the parties, this statute requires that where the price of the goods, or choses in action, agreed to be sold is more than fifty dollars, and no part thereof has been delivered, and no part of the purchase price paid, a note or memorandum of such contract must be made in writing, and be subscribed by the parties to be charged thereby, or by a lawful agent of such party. In this case, a note or memorandum of the contract was made in writing, and signed by the lawful agent of the defendant; and we think that this was a sufficient compliance with the statute, according to the settled construction which has been given to it. The object of the statute, as it appears to us, is as fully accomplished when the contract is signed by the agent as if it had been signed by or in the name of the principal.

In *Wilson v. Hunter* (7 Taun., 295), it was held that the statute of frauds did not exclude parol evidence that a written contract for the sale of goods purporting to be made between A., as seller, and B., the buyer, was on his part made by him only as the agent of C. So in *Cox v. Painter* (8 Adol. & Ell., 491), Lord DENMAN said, there is no doubt that evidence is admissible on behalf of one of the contracting parties, to show that the other was agent only though contracting in his own name, and so to fix the real principal. But the agent himself may be charged at the election of the opposite party,

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where he contracts in his own name. So in *Trueman v. Loder* (11 Adol. & Ell., 589), the plaintiff and defendants were residents, the former of London and the latter at St. Petersburg; and the defendant had for several years done business in London through an agent, Higginbottom, and in his name. Before the transaction in question the defendant, becoming dissatisfied with Higginbottom, gave him notice that his services were no longer required; after which, Higginbottom contracted to sell tallow to the plaintiff of more than ten pounds value, using his own name as before. He intended to make the contract on his own account; but this was not known to the plaintiff, and he supposed Higginbottom represented the defendant as he had done before. It was held that the defendant was liable for the non-delivery of the tallow. In this case, Lord DENMAN says parol evidence is always necessary to show that the party sued is the person making the contract and bound by it, whether he does so in his own name, or in that of another, or in a feigned name; and whether the contract be signed by his own hand or that of an agent, are inquiries not different in their nature from the question, who is the person that ordered goods in a shop. (8 M. & W., 334; 4 Barn. & C., 664; 12 Wend., 417; 9 M. & W., 79; 14 How. U. S., 446; *Bank of Genesee v. Patchin Bank*, 19 N. Y., 312.) It seems to have been too long and too well settled, that an action can be maintained against a principal upon a contract for the sale of goods made by an agent in his own name to be now changed, whatever we may have thought of it as an original question; and this, as well where the contract is within the statute of frauds as where it is not; and the legislature, in the re-enactments of the statute, have not seen fit to make any change of the law in this respect. We think, therefore, that the court was right in treating these contracts as the contracts of the defendant.

The plaintiffs, before resting, proved that at the time the several contracts were made, and for considerable time thereafter, they were the owners and in possession of certificates of shares of the New York and Erie Railroad Company's stock to

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as large an amount as those contracted to be sold by said three contracts.

The defendant set up and claimed that those contracts were void under the stock-jobbing act, and for the purpose of establishing such defense, he offered to prove that on the 2d May, 30th May and 5th June, 1854, the dates of the contracts in question, the plaintiffs had other contracts outstanding made by them for the sale by them of shares of the same stock deliverable at the option of the buyer at any time within thirty or sixty days from the dates of such outstanding contracts, and that the number of shares so sold and deliverable under such outstanding contracts exceeded, on those days and on each of said days, the number of shares of stock the certificates of which the plaintiffs had proved themselves to be in possession of on such several days.

The statute declared that "All contracts for the sale of stocks are void, unless the party contracting to sell the same shall, at the time of making such contracts, be in the actual possession of the certificates of such shares or be otherwise entitled thereto in his own right, or be duly authorized by some person so entitled to sell the certificates of shares so contracted for (1 R. S., p. 710, § 6). This evidence would clearly have been proper if the defendant had, in connection therewith, proposed to show that at the time of making the contracts in suit, the plaintiffs did not own, and were not authorized to sell, any stocks other than those of which they had proved themselves to be the owners. If this was all they owned or were lawfully authorized to sell when these contracts were made, and they then had subsisting contracts for its sale to other parties, it would be plainly a violation of the statute for the plaintiff to contract for the sale of the same or an additional amount, which they did not have, to this defendant.

The relevancy of this testimony under the offer must depend entirely upon whom the burden of proof lies in such a case. If on the part of the defendant, then the offer did not go far enough. But if it lay with the plaintiffs, and they having only shown that they owned one thousand one hundred shares,

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the amount contracted to the defendant, it would then be competent for him to show that the plaintiffs had other prior outstanding and subsisting contracts for the sale of this amount of stock to other parties. The burden would then be shifted to the plaintiffs to show that they owned or were duly authorized to sell an additional amount of stock equal to what they contracted to sell to the defendant. *Stebbins v. Leowolf* (8 Cush. R., 143) cited by the defendant, favors his views of the case. It was an action upon a similar contract made in this State to recover the difference in the price contracted to be paid for stock and its value on the day it was to be delivered. The court held that to enable a party to recover on such a contract he must prove not only the making of the contract, but also that the seller was then the owner of the stock which he stipulated to sell at a future day: that it was an element essential to the validity of the contract, without which it could not be enforced against the purchaser.

But we think this doctrine cannot be maintained. If, as has been shown, the contract is a valid one upon its face, and not void by the statute of frauds, all that was necessary for the plaintiff to do, was to prove the execution of the contract; a readiness and offer to perform on his part, and the refusal of the defendant, to entitle him to recover. Such a contract at common law, and in absence of the stock-jobbing act, would be clearly valid; and the courts will not presume that the party contracting to sell stocks was not the owner thereof, for the purpose of rendering the contract void. On the contrary, the presumption is that the contract is valid until the contrary is shown by the defendant. Where a contract is apparently valid upon its face, the party seeking to impeach it must prove that it was made under such circumstances or for such purpose as to render it void, before the defence can be made available. We are quite clear that the burden of proof rested upon the defendant to show that the plaintiffs, at the time they made these contracts, did not own and were not authorized to sell the stock contracted for; or that they did not own and were not authorized to sell the amount mentioned

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in these and prior subsisting contracts for the sale thereof made by them.

The offer of the defendant, therefore, did not go far enough; and for that reason the evidence was properly rejected. This view of the case renders it unnecessary to examine or pass upon the effect of the repeal of the stock-jobbing act in 1858, after the trial of the case.

The judgment must be affirmed.

SELDEN, J., was absent; JAMES, J., expressed no opinion; all the other judges concurring,

Judgment affirmed.

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A contract to be "accountable that B will pay you for glass, paints, &c., which he may require in his business, to the extent of fifty dollars," is a continuing guaranty. The limitation is not of the credit to B, but of the extent of the guarantor's liability.

The doctrine of *Gates v. McKee* (3 Kern., 232), re-affirmed.

APPEAL from an order of the Supreme Court at general term in the third district, reversing a judgment in favor of the plaintiff, entered upon the report of a referee.

The action was brought upon the following guaranty:

"Mr. Rindge, Sir: I will be accountable to you that Mr. Butler will pay you for a credit on glass, paints, &c., which he may require in his business, to the extent of fifty dollars.

"Dated, Nov. 29th, 1858.

"D. C. JUDSON."

The referee found "that the plaintiff was, at the time, a dealer in glass, paints, &c., at Ogdensburgh, New York; and J. W. Butler, the individual named in the guaranty, was, at the date thereof, a glazier and manufacturer of sash and blinds at Ogdensburgh, aforesaid, and, at the date of said guaranty,

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was indebted to the plaintiff in the sum of \$33.48; that the plaintiff, relying upon the guaranty, delivered to said Butler glass, paints, &c., as required in his business, at divers times between Nov. 29, 1858, and June 2, 1859, to the amount of \$170.95.

"That Butler made payments; so that on the fourth day of July, 1859, there was due on said account a balance of \$74.18; and that Butler was insolvent." And, as a conclusion of law, the referee held "that the equitable and legal import and meaning of the contract executed by the defendant was, and should be construed to be, a limitation as to the extent of the defendant's liability, and not a limitation of credit to said Butler."

The Supreme Court reversed the judgment of the referee, on the ground that contracts of this nature were *strictissimi juris*; that the contract before us employed the singular term, "a credit," not several, nor a continuous credit; and that its language could not be extended by construction beyond its strict sense and meaning. The plaintiff appealed to this court. The case was submitted on printed arguments.

Francis A. Bacon, for the appellant.

Bishop Perkins, for the respondent.

JAMES, J. The principal question for adjudication is whether the instrument sued on is or is not a continuing guaranty. As was said by Justice DENIO in *Gates v. McKee* (3 Kern., 232), "if this were the first time that an instrument of this character had come before the courts, and we were called upon to construe it without reference to adjudged cases, we would find no difficulty in holding that the limit of fifty dollars had reference to the amount of the defendant's liability rather than the amount of dealing between Butler and Rindge."

Had the guarantor desired or intended to limit his responsibility to a single transaction, or to several transactions not exceeding that sum in all, it was so easy to have said it in

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plain and unmistakable terms, that if he has failed to do so, and by equivocal language induced the guarantee to part with goods, he should be held to abide the consequences.

Except to demonstrate principles, not much aid can be obtained from adjudged cases in determining questions of this kind; because each case must depend mainly upon the terms of the instrument, and it is scarcely possible that two instruments should be precisely alike. The cases upon this question do not all agree upon the principle by which such agreements should be construed; and I think this case must turn mainly upon the question whether the contract is to be strictly construed, or whether it is to be construed like other instruments. I had supposed the question disposed of by this court in *Gates v. McKee* (*supra*), but as the Supreme Court has seen fit to question the correctness of that decision, it may not be inappropriate to refer again to the cases bearing upon that subject.

The leading English case is *Mason v. Pritchard* (12 East, 227), where it was laid down by the court that "the words were to be taken as strongly against the party giving the guaranty as the sense of them would admit." That case was followed by *Hargrave v. Smee* (6 Bing., 244), where Chief Justice TINDAL said: "The question is, what is the fair import to be collected from the language used in this guaranty? The words employed are the words of the defendant, and there is no reason for putting on a guaranty a construction different from that which the court puts upon any other instrument. With regard to other instruments the rule is, that if the party executing them leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself." PARK, J., said "the only question of principle which has been agitated on the present occasion is whether these instruments are to be construed strictly; and I am not disposed to hold the doctrine which has been imputed to Lord WYNFORD, that a guaranty ought to receive a strict construction. That was not the principle adopted in *Mason v. Pritchard* by Mr. Baron WOOD, who tried the cause, and the very learned persons who decided it."

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In *Brooks v. Haigh* (10 Adol. & Ellis, 323), in the Exchequer Chamber, Lord ABINGER said: "It is the opinion of all the court that there was in the guaranty an ambiguity that might be explained by evidence, so as to make it a valid contract." So again in *Mayer v. Isaac* (6 Mees. & Wels., 629), upon citation by counsel of the case of *Nicholson v. Paget* (5 C. & P., 395), holding that a party furnishing goods on the faith of a guaranty was bound to see that it was couched in such words as that the guarantor might distinctly understand to what he was binding himself. Baron PARKE interrupted counsel, and inquired: "Do you find any other authority to support the rule of construction there laid down? It is certainly at variance with the general rule of the common law, which is that the words of an instrument are to be taken most strongly against the party using them. A guaranty is one of that class of obligations which is binding only on one of the parties, until the other chooses by his own act to make it binding on him also. This instrument does not contain the words of both parties, but of one only, the defendant; the plaintiff agrees to nothing on the face of it," and in pronouncing the judgment of the court, Baron ALDERSON said, "the generally received principle of law is, that the party who makes any instrument should take care so to express the amount of his own liability as that he may not be bound beyond what it was his intention that he should be; and, on the other hand, that the party who receives the instrument, and parts with his goods on the faith of it, should rather have a construction put upon it in his favor, because the words of the instrument are not his, but those of the other party; and, therefore, if I were obliged to choose between the two conflicting principles which have been laid down on this subject, I should rather be disposed to agree with that given in *Mason v. Pritchard*, than with the opinion of BAGLEY, B., in *Nicholson v. Paget*."

The principle of these cases was recognized in *Bainbridge v. Wade* (1 Eng. L. & Eq. R., 236), and in *Broom v. Batchelor* (37 id., 572, 1856).

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I have not been able to find that the case of *Mason v. Pritchard* has ever been questioned of late years, and never directly, except by the case of *Nicholson v. Paget*; which latter case, as is shown, has been often repudiated. This principle certainly was not questioned in *Melville v. Hayden* (3 Barn. & Ald., 593). That case only questioned the construction given to the guaranty, and not the rule by which it was to be construed. But if it were otherwise, the later decisions of the same court have disregarded it, and followed the principle of *Mason v. Pritchard*.

The decisions in the United States Supreme Court upon this question are equally emphatic and conclusive. To take them up in their inverse order of time, I will refer, first, to the case of *Laurence v. McCalmont* (2 How., 426, 449), where STORY, J., said: "Some remarks have been made, on the argument here, upon the point, in what manner letters of guaranty are to be construed; whether they are to receive a strict or a liberal interpretation. We have no difficulty whatever in saying that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation, we do not mean that the words should be forced out of their natural meaning, but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed, and the purposes to which it is applied. We should never forget that letters of guaranty are commercial instruments, generally drawn up by merchants in brief language, sometimes inartificial, and often loose in their structure and form; and to construe the words of such instruments with a nice and technical care, would not only defeat the intentions of the parties, but render them too unsafe a basis to rely on for extensive credits. The remarks made by this court in *Bell v. Bruen* (1 How., 169-186), meet our entire approbation. In the latter case, the court said: 'We think the court should adopt the construction which, under all the circumstances of the case, ascribes the most reasonable, probable and natural conduct to the parties.' In the language of this court in *Douglass v. Reynolds* (7 Pet., 122), 'Every

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instrument of this sort ought to receive a fair and reasonable interpretation, according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification, or liberal construction, beyond the fair import of its terms.' Or, it is 'to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety; as declared in *Lee v. Dick* (10 Pet., 493). The presumption is, of course, to be ascertained from the facts and circumstances accompanying the transaction." It was further said, in the case of *Douglass v. Reynolds* (*supra*), "As these instruments are of extensive use in the commercial world, upon the faith of which large credits and advances are made, care should be taken to hold the party bound to the full extent of what appears to be his engagement; and for this purpose, it was recognized by this court in *Drummond v. Prestman* (12 Wheat., 515), as a rule in expounding them, that the words of the guaranty are to be taken as strongly against the guarantor, as the sense will admit."

The cases of *Cremer v. Higginson* (1 Mas., 323), and *Mauran v. Bullus* (16 Pet., 537), are often cited—and were in the opinion of one of the justices of the Supreme Court in reversing the judgment of the referee in this case—as containing a different rule. *Cremer v. Higginson* was a circuit decision of Justice STORY, made in 1817, wherein he said, "the language of a letter should be very strong that would justify a court in holding the guaranty to be a continuing guaranty, which is to cover advances from time to time to the stipulated amount, *toties quoties*, until the guarantor shall give notice to the contrary. I see nothing in this letter to justify such a conclusion; and, in every doubtful case, I think the presumption ought to be against it." As this decision upon the question under consideration is directly opposed to the subsequent decisions of the same court at bar, the opinions in some of which were pronounced by the same learned judge, the case cannot now be regarded as authority. In the case of *Mauran v. Bullus*, the question here under consideration was

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not before the court. It is true, that Justice McLEAN in that case said: "Generally, all instruments of suretyship are construed strictly, as mere matters of legal right;" but the question here is as to the rule of construction.

The rule, as laid down in *Mason v. Pritchard*, prevails in Massachusetts, *Bent v. Hartshorn* (1 Met., 24), and in Connecticut, *Rapelje v. Bailey* (5 Conn., 149). It was long ago adopted in this State. BRONSON, J., in *Dobbin v. Bradley* (17 Wend., 422), said: "In this, as in other cases, such a construction should be put upon the contract as will carry into effect the intention of the parties. The extent of the obligation must be ascertained by considering the language of the instrument, and the nature of the transaction to which it relates. Commercial guaranties are in extensive use; and I can perceive no reason why they should not receive the same liberal construction, for attaining the end the parties had in view, as is given to other contracts;" citing *Douglass v. Reynolds*, and *Hargrave v. Smee*.

These authorities are ample to show the soundness of the rule adopted by this court in *Gates v. McKee* (*supra*), viz.: "That when the question is as to the meaning of the written language in which a guarantor has contracted, there is no difference, and there ought not to be any, between the contract of a surety and that of any other party."

Such being the rules of interpretation, it now becomes necessary to apply them to the instrument under consideration.

Looking at the facts of this case, the situation and business of the parties and the circumstances under which the guaranty was given, there would seem to be no doubt that its purposes were not fully accomplished when the person whose credit was intended to be aided had once contracted a debt to the plaintiff of \$50, and had paid it.

Butler was a manufacturer who needed glass, paints, &c., in his business, and he desired a credit with a dealer for that purpose. Rindge was a dealer in those articles, and to establish a credit with Rindge to the extent of fifty dollars, Butler procured the guaranty in question, and Rindge gave him a credit

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on the faith of it. The purpose of Butler, as well as the understanding of Rindge, is clearly apparent, and the construction given to the instrument by Rindge was that which any person knowing the parties and their situation would naturally apply to it to facilitate the purposes it seemed designed to accomplish. It was for a credit on paints, glass, &c., required in Butler's business to the extent of fifty dollars—not for a credit of fifty dollars' worth of glass, paints, &c. Had the guarantor designed a single credit it was so easy to have said it in plain terms, that the elaborate expressions of this instrument were calculated to mislead.

Much stress was laid upon the words "a credit" by the Supreme Court. These words, however, were not used in a limited or restricted sense, but in an enlarged and commercial sense, as implying reputation and confidence; a basis on which Butler might trade as he desired without payment, to the extent limited. Had a single transaction been contemplated no allusion to the business of Butler was necessary or natural, but looking to a continuous credit, the restriction to such glass, paints, &c., as he should require in his business, was very natural and proper. The use of such words in the instrument in the absence of an express limitation as to time, naturally induced the belief in the mind of the guarantee, that the instrument was intended to aid Butler in the prosecution of his business.

The rule is that whenever by the terms of the undertaking, or by the recital in the instrument, or by reference to the custom or course of dealing between the parties, the guaranty would seem to look to a future course of dealing for an indefinite time, or a succession of credits, it is to be deemed a continuing guaranty and the amount expressed is to limit the amount for which the guarantor is to be responsible, and not the amount to which the dealing or whole credit given is to extend. Viewed by either rule, the instrument under consideration would seem to look to a future and continual course of dealing between Butler and Rindge; and not to a single transaction or to dealings between them to a particular amount.

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If such was not the intention of the guarantor his undertaking was susceptible of that interpretation, and the plaintiff having given it that construction and relied upon it, it should, upon the principles of construction settled by the cases cited, receive such interpretation as would protect him from loss.

This case bears so strong a resemblance in its facts to that of *Gates v. McKee* (*supra*), that they cannot well be distinguished, and each should receive the same construction. In the one case the order was addressed to Mr. Gates, in the other to Mr. Rindge; in the one the promise was to be responsible, in the other to be accountable; in the one the guaranty was "for what stock McKee has had or may want hereafter to the amount of \$500;" in the other it was "for a credit on glass, paint, &c., which Butler may require in his business to the extent of \$50." Unless this court is prepared to overrule the principle upon which the decision of *Gates v. McKee* was based, then the judgment of the general term should be reversed, and judgment final entered for the plaintiff.

COMSTOCK, Ch. J., SELDEN, DENIO, LOTT and HOYT, Js., concurred; MASON, J., dissented; DAVIES, J., did not sit in the case.

Judgment reversed, and judgment final for plaintiff.

WATKINS v. ABRAHAMS and ELSIE, his wife.

A confession of judgment, without action, by a married woman is void, although the consideration be money borrowed for and applied to the improvement of her separate estate.

When husband and wife unite in confessing a judgment, it may be retained as good against the husband, though void as to the wife.

APPEAL from the Supreme Court. In April, 1853, the defendant, Abrahams and his wife signed a statement in writing, and verified it by the oaths of both, for the purpose of

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confessing judgment thereon without action. The indebtedness arose upon four promissory notes, two of them made by third persons and indorsed by both the defendants, the others made by the two defendants. All of the notes had been discounted by the plaintiff, had matured and were dishonored. Upon this statement a general judgment was entered against the defendants for \$1,179.47. Afterwards upon an affidavit that the husband had no property, and that the wife was the owner of real estate—her separate property—a receiver was appointed of her separate estate. The wife had notice of the motion for that purpose, but being ignorant of her rights, suffered it to go by default. Upon being instructed of her rights, the defendants moved to vacate the order and for general relief. It was shown in opposition to the motion, that the money for which the judgment was confessed was borrowed for the purpose of being expended, and was in fact expended, in building a house upon one of the lots belonging to the wife's separate estate. The court, at special term, vacated the order for a receivership, and set aside the judgment as to both defendants. This order having been affirmed at general term, in the third district, the plaintiff appealed to this court.

John K. Porter, for the appellant.

Martin J. Townsend, for the respondents.

MASON, J. I do not see that there was any error committed in setting aside the judgment in this case, which this court can review. I do not understand that a personal judgment can be entered against a *feme covert* by confession. There are good reasons why this cannot be done. In the first place the common law courts in England and this country do not allow a judgment *in personam* to be given against a *feme covert*. It has been so long and well settled, that such a judgment could not be rendered against her, that it has been held erroneous, and such judgments invariably have been set aside on motion. (2 Grah. Pr., 772, 2d ed.; *Brittin v. J. M. Wilder* and *Mary Wilder*, 6 Hill, 242; 3 Taunt. R., 261.) There is

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nothing in the present Code that removes the disabilities which the common law has thrown around a married woman in this respect, and she can no more confess a valid judgment *in personam* than an infant. She was always placed on the same footing in this respect as an infant. This judgment was clearly erroneous against the wife, and was properly set aside as to her; and it seems to me it was entirely discretionary with the court below, whether they would amend the record which had already been filed, and allow the judgment to stand against the husband, or whether they would set it aside entirely. (6 Hill, 242.) It involved a mere question of practice, which this court cannot review (2 Comst., 186), but as my brethren are of opinion that the judgment against the husband was right, and that the court should not have set it aside as to him, the order is affirmed as to the wife, and reversed as to the husband.

All the judges concurring,

Ordered accordingly.

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THE PEOPLE, *ex rel.* HACKLEY, *v.* KELLY, &c.,

AND MATTER OF ANDREW J. HACKLEY.

The Constitution (Art. 1, § 6,) does not protect a witness in a criminal prosecution against another from being compelled to give testimony which implicates him in a crime when he has been protected by statute against the use of such testimony on his own trial.

That the information thus elicited facilitates the discovery of other evidence by which the witness may be subsequently convicted, is an incidental consequence against which the Constitution does not guard him. Its prohibition is simply against his being required to give evidence where he himself is upon trial.

The refusal of a witness to answer a proper question before a grand jury is punishable as a contempt under the statute (2 R. S., p. 534, § 1, p. 735, § 14), as committed in a proceeding upon an indictment.

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When the refusal was reported by the grand jury to the court in the presence of the witness, who did not deny but justified the same, and reiterated the refusal, the contempt is one "in the immediate view and presence of the court," and no affidavit or further evidence is requisite to a commitment.

The appellate court, before which the propriety of a commitment for contempt is brought by *certiorari*, or even collaterally on *habeas corpus* is bound to discharge the prisoner where the act charged as criminal is necessarily innocent or justifiable, or where it is the mere assertion of a constitutional right.

The adjudication of the court in which the alleged contempt occurred, while conclusive that the party committed the act whereof he was convicted, and of its character when that might, according to the circumstances, be meritorious or criminal, cannot establish as a contempt that which the law entitled the party to do.

THE first case was an appeal from a judgment of the Supreme Court, by which Hackley, the relator, was remanded to the custody of the sheriff, after a hearing of his case upon a return to a writ of *habeas corpus*, issued at his instance to the said sheriff. The other was an appeal from the judgment of the same court, dismissing a *certiorari* which Hackley had procured to be issued to the Court of General Sessions of the city and county of New York, to review an order of that court, adjudging him guilty of a criminal contempt, and to be imprisoned therefor the term of thirty days; from which imprisonment it was also the purpose of the *habeas corpus* to relieve him. The object of the proceeding in both cases was to determine the legality of the conviction of Hackley for a contempt.

The record of the Court of Sessions, set out in the return to the *habeas corpus* and in the return to the *certiorari*, was as follows:

At a Court of General Sessions of the Peace, holden in and for the city and county of New York, &c., April 31, 1861.

Present—JOHN T. HOFFMAN, Recorder.

In the matter of Andrew J. Hackley.

The grand jury, heretofore in due form selected, drawn, summoned and sworn to serve as grand jurors, in the Court of General Sessions of the Peace in and for the city and

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county of New York, come into court and make complaint by and through their foreman, theretofore duly appointed and sworn, that Andrew J. Hackley, after being duly summoned and sworn, as prescribed by law, as a witness in a certain matter and complaint pending before such grand jury, whereof they had cognizance, against certain aldermen and members of the common council of the city of New York, for feloniously receiving a gift of money, under an agreement that their votes should be influenced thereby in a matter then pending before said aldermen and members of the common council in their official capacity, did then and there refuse to answer the following legal and proper interrogatory, propounded to him, the said Andrew J. Hackley, to wit: "What did you do with the pile of bills received from Thomas Hope, and which he told you amounted to fifty thousand dollars?" And the said Andrew J. Hackley then and there, instead of answering the said interrogatory, stated as follows, to wit: "Any answer which I could give to that question would disgrace me, and would have a tendency to accuse me of a crime. I therefore demur to the question, referring to the ancient common law rule, that no man is held to accuse himself, and to the sixth section of the first article of the Constitution of this State." And the court having then and there decided that the said interrogatory is a legal and proper one, and that the reasons given by the said Andrew J. Hackley for not answering the same are invalid and insufficient; and now ordering the said Andrew J. Hackley to answer the said interrogatory, and he, the said Andrew J. Hackley, still contumaciously and unlawfully refusing to answer the said interrogatory, the court doth hereby adjudge the said Andrew J. Hackley, by reason of the premises aforesaid, guilty of a criminal contempt of court; and doth further order and adjudge that the said Andrew J. Hackley, for the criminal contempt aforesaid, whereof he is convicted, be imprisoned in the jail of the county for the term of thirty days.

Hackley appealed from the judgment of the Supreme Court in both cases.

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James T. Brady and *Amasa J. Parker*, for the appellant, maintained that the provision in the Constitution, which declares that no person "shall be compelled in a criminal case to be a witness against himself," should not be limited to testimony in criminal prosecutions against the party, but that by a proper and necessary construction, it should be held to protect every person from being required in any case, to give testimony, the tendency of which would be to accuse him of a crime. If the rule could be affected by legislation, then it was not enough that he should be guarded against having his testimony given in evidence, as his admission, in a prosecution which might be afterwards brought against him, as was done by the statute relied on, but that he should be wholly protected against any prosecution for the offence; inasmuch as his testimony might disclose facts and circumstances which, being thus ascertained, might be proved against him by testimony other than his sworn admission. They also insisted that the commitment was void on its face, because the Revised Statutes did not make a refusal to testify before a grand jury a contempt; and, also, that the commitment did not show that his misconduct was committed in the immediate view and presence of the court, or that the facts were proved by affidavit served on the accused, with a reasonable time given him to make his defence.

John H. Anthon, for the respondent, besides controverting those positions, argued that the propriety of the commitment could not be examined upon the return to a writ of *habeas corpus*.

DENIO, J. As a general rule, the propriety of a commitment for contempt is not examinable in any other court than the one by which it was awarded. This is especially true where the proceeding by which it is sought to be questioned is a writ of *habeas corpus*; as the question on the validity of the judgment then arises collaterally, and not by the way of review. The *habeas corpus* act, moreover, declares that where the detention of the party seeking to be discharged by

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habeas corpus appears to be for any contempt, plainly and specially charged in the commitment, ordered by a court of competent jurisdiction, he shall be remanded to the custody in which he was found. But this rule is of course subject to the qualification, that the conduct charged as constituting the contempt must be such that some degree of delinquency or misbehavior can be predicated of it; for if the act be plainly indifferent or meritorious, or if it be only the assertion of the undoubted right of the party, it will not become a criminal contempt by being adjudged to be so. The question whether the alleged offender really committed the act charged, will be conclusively determined by the order or judgment of the court; and so with equivocal acts, which may be culpable or innocent according to the circumstances; but where the act is necessarily innocent or justifiable, it would be preposterous to hold it a cause of imprisonment. Hence, if the refusal of Mr. Hackley, the relator, to answer the question propounded to him, was only an assertion of a right secured to every person by the Constitution, it was illegal to commit him for a contempt; and this error was certainly reached by the *certiorari*, if not examinable on the return to the *habeas corpus*.

On the other hand, if the case was such that he was obliged by law to answer the inquiry, the power of the court to punish him for his refusal was undoubted. If the case is not reached by the statute, the power would be ample at the common law. But I am of the opinion that the statute applies to the refusal of a witness to answer a legal question put to him by the grand jury, to the same extent as though he were called to give testimony on the trial of an issue before the court or a petit jury. The act declares that courts of record have power to punish by fine and imprisonment any misconduct by persons summoned as witnesses, for refusing to be sworn or to answer as such witnesses. (2 R. S., p. 584, § 1, subd. 5.) The title of the Revised Statutes in which this is found relates primarily to proceedings in civil cases. By another provision, however, the enactment just mentioned, together with several other directions relating to trials in civil cases, are declared to

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extend to trials and other proceedings on indictments, so far as they may be in their nature applicable thereto. (2 R. S., p. 785, § 14.) The criticism of the appellant's counsel is, that the examination of a witness before a grand jury is not a proceeding upon an indictment, and so not within the statute. In one sense it is not. But by the theory of proceedings in criminal cases, the indictment is supposed to be prepared and taken before the grand jury by the counsel prosecuting for the State; and the evidence is then given in respect to the offence charged in it. If the party accused appears to be guilty, the indictment is certified to be a true bill: otherwise, it is thrown out. In that view of the practice, all which takes place before the grand jury as well as the subsequent steps may be said to be proceedings upon the indictment.

It is further urged on the part of the relator that the conviction is erroneous because it does not appear that the contempt was committed in the presence of the court, and that there was no proof by affidavit, as required by the statute. (2 R. S., p. 585, §§ 2, 3.) It appears by the record returned, that, the relator and the grand jury being present in open court, it was stated on the part of the jury that the relator had declined to answer the inquiry touching the disposition of certain moneys which had come to his hands—basing his refusal upon the constitutional provision. The question being thus presented for the determination of the Court of Sessions, it held that the constitutional provision did not apply, and the relator was thereupon directed to answer the interrogatory as required by the grand jury. It is not to be understood that the order was to proceed with the examination on the spot. What was said was for the purpose of settling the rights and duties of the witness and of the jury, when they should be again convened in the grand jury room. The witness might have postponed his election whether he would obey or not, until the examination before the jury was resumed; but he chose, as was doubtless the most convenient course, to declare his determination at once. He thereby waived the formality of having the question repeated in the

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jury room, and the court was at liberty to act, as it did, upon that waiver. The refusal of the prisoner to give testimony in answer to the contested question was made in the face of the court. If such refusal was a contempt, such contempt was committed "in the immediate view and presence of the court;" and it was authorized by the statute to act without further evidence.

But if it were necessary to proceed under the other branch of the statute, and to prove to the court the transaction before the grand jury, the conviction would not be even erroneous. The relator and the jury being present, the latter reported the particulars of the contumacy with the relator, including his reasons for refusing to answer. It does not appear that it was denied by him, or that he asked for time to refute what was alleged against him. On the contrary, when informed that it was his duty to answer, he, as the record states, still refused to answer. The whole of these proceedings assume that the statement of the jury was conceded by the witness to be a correct account of what had transpired up to that time. The appearance of the relator before the court must have been gratuitous; for there is no statement that any notice had been given or any process issued. His voluntary appearance and his persistence in the course which it was alleged he had taken before the grand jury was an implied admission of the facts, and a waiver of further time to defend himself. It is apparent that the question was presented in a manner somewhat informal; but it was assented to by the parties, in order to have a prompt determination of the constitutional question involved.

There seems, therefore, to be nothing to preclude us from examining the main question, whether the relator could lawfully refuse to answer the interrogatory put to him.

The bribery act of 1853, declares the giving to or receiving money, &c., by any of divers public officers named, including any member of the common council of a city, with a view to influence their action upon any matter which may come officially before them, an offence punishable by fine and imprisonment in a state prison. For the purpose of enabling

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the public to avail itself of the testimony of a participator in the offence, the fourteenth section provides as follows: "Every person offending against either of the preceding sections of this article shall be a competent witness against any other person so offending, and may be compelled to appear and give evidence before any magistrate or grand jury, or in any court in the same manner as other persons; but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying" (Ch. 539.) A similar provision is found in an act to amend the charter of the city of New York, passed in 1857. The fifty-second section relates to bribes of the members of the common council and the officers of the corporation, making the giving and the receiving of bribes highly criminal, and concluding with an enactment substantially similar to the fourteenth section of the act of 1853. The design was to enable either party concerned in the commission of an offence against the act, to be examined as a witness by the grand jury or public officer entrusted with the prosecution. The question to be determined is whether these provisions are consistent with the true sense of the constitutional declaration, that no person shall be compelled in any criminal case to be a witness against himself (Art. 1, § 6.)

The primary and most obvious sense of the mandate is that a person prosecuted for a crime shall not be compelled to give evidence on behalf of the prosecution against himself in that case. It is argued that no such narrow and verbal construction could have been in the view of the authors of the article, for the reason that no such atrocious procedure as that supposed has been tolerated in civilized countries in modern times. But constitutional provisions are not leveled solely at the evils most current at the times in which they are adopted, but, while embracing these, they look to the history of the abuses of political society in times past, and in other countries, and endeavor to form a system which shall protect the members of the State against those acts of oppression and misgovernment which unrestrained political or judicial power are always and

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everywhere most apt to fall into. (See the observations of Chief Justice SPENCER on this subject, reported in 18 John., 202.) The history of England in early periods, furnishes abundant instances of unjustifiable and cruel methods of extorting confessions; and the practice at this day in the criminal tribunals of the most polished countries in continental Europe is to subject an accused person to a course of interrogatories which would be quite revolting to a mind accustomed only to the more humane system of English and American criminal law. It was not, therefore, unreasonable to guard by constitutional sanctions against a repetition of such practices in this State; and it is not at all improbable that the true intention of the provision in question corresponds with the natural construction of the language. But there is great force in the argument that constitutional provisions, devised against governmental oppressions, and, especially against such as may be exercised under pretence of judicial power, ought to be construed with the utmost liberality, and to be extended so as to accomplish the full object which the author apparently had in view, so far as it can be done consistently with any fair interpretation of the language employed. The mandate that an accused person should not be compelled to give evidence against himself, would fail to secure the whole object intended, if a prosecutor might call an accomplice or confederate in a criminal offence and afterwards use the evidence he might give to procure a conviction on the trial of an indictment against him. If obliged to testify on the trial of the co-offender to matters which would show his own complicity, it might be said upon a very liberal construction of the language that he was compelled to give evidence against himself, that is, to give evidence which might be used in a criminal case against himself. It is perfectly well settled that where there is no legal provision to protect the witness against the reading of the testimony on his own trial, he cannot be compelled to answer. (*The People v. Mather*, 4 Wend., 229, and cases there referred to.) This course of adjudication does not result from any judicial construction of the Constitution, but is a branch of the common law doctrine which excuses

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a person from giving testimony which will tend to disgrace him, to charge him with a penalty or forfeiture, or to convict him of a crime. It is of course competent for the legislature to change any doctrine of the common law, but I think they could not compel a witness to testify on the trial of another person to facts which would prove himself guilty of a crime without indemnifying him against the consequences, because I think, as has been mentioned, that by a legal construction, the Constitution would be found to forbid it.

But it is proposed by the appellant's counsel to push the construction of the Constitution a step further. A person is not only not compellable to be a witness against himself in his own cause, or to testify to the truth in a prosecution against another person where the evidence given, if used as his admission, might tend to convict himself if he should be afterwards prosecuted, but he is still privileged from answering, though he is secured against his answers being repeated to his prejudice on another trial against himself. It is no doubt true that a precise account of the circumstances of a given crime would afford a prosecutor some facilities for fastening the guilt upon the actual offender, though he were not permitted to prove such account upon the trial. The possession of the circumstances might point out to him sources of evidence which he would otherwise be ignorant of, and in this way the witness might be prejudiced. But neither the law nor the Constitution is so sedulous to screen the guilty as the argument supposes. If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent or at least capable of proof, though his account of the transactions should never be used as evidence, it is the misfortune of his condition and not any want of humanity in the law. If a witness objects to a question on the ground that an answer would criminate himself, he must allege, in substance, that his answer, if repeated as his admission on his own trial, would tend to prove him guilty of a criminal offence. If the case is so situated that a repetition of it on a prosecution against him is impossible, as where it is

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forbidden by a positive statute, I have seen no authority which holds or intimates that the witness is privileged. It is not within any reasonable construction of the language of the constitutional provision. The term 'criminal case,' used in the clause, must be allowed some meaning, and none can be conceived other than a prosecution for a criminal offence. But it must be a prosecution against *him*; for what is forbidden is that he should be compelled to be a witness against himself. Now if he be prosecuted criminally touching the matter about which he has testified upon the trial of another person, the statute makes it impossible that his testimony given on that occasion should be used by the prosecution on the trial. It cannot, therefore, be said that in such criminal case he has been made a witness against himself, by force of any compulsion used towards him to procure, in the other case, testimony which cannot possibly be used in the criminal case against himself.

I conclude, therefore, that the relator was not protected by the Constitution from answering before the grand jury.

A similar question has been before the former Court of Chancery and the late Court of Errors. By the usury act of 1837, it was made a criminal offence to take usurious interest, and, by a provision of the same act, a plaintiff, in an action at law, brought on a contract alleged to be usurious, might be examined by the defendant as a witness to prove the usury, and the alleged usurer was likewise obliged to answer a bill of discovery on oath; but it was provided that neither the testimony so given, nor the sworn answer of the defendant in Chancery, should be used against the party who had so testified or answered, either before the grand jury, or on the trial of an indictment (Ch. 480.) In *Perine v. Pixley* (7 Paige, 598), the defendant had demurred to the plaintiff's bill which was filed to enjoin proceedings at law on a note alleged to be usurious, and which required a discovery of the usury by the defendant's oath. The Chancellor considered the statutory provision, that the answer should not be used against the party, before the grand jury or on the trial of an indictment

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against him, as an answer to the objection taken on the ground now under consideration; but the case was decided against the plaintiff on another ground. The case of *Henry v. The Bank of Salina* (5 Hill, 523; *S. C.*, in the Supreme Court, 1 id., 555), approaches very near to a judgment of the Court of Errors upon the precise point. On the trial, the defendant had offered to call the real plaintiff to prove the usury, in an action at law, pursuant to the act of 1837; though the plaintiff on the record was another person who had no interest in the demand. The main question was whether one for whose benefit the action was brought, but who was not the plaintiff on the record, was within the scope of the statute. The Supreme Court held he was not; and hence, that not having the protection of the statute, he could not be compelled to prove himself guilty of a misdemeanor. The judgment, which was for the plaintiff, was reversed in the Court of Errors; where it was held that a plaintiff in interest was within the statute, and that the Supreme Court had committed an error in not compelling the plaintiff to be sworn. Such a decision, of course, assumed that the statute requiring the plaintiff to be sworn, was constitutional on the ground that it afforded a sufficient protection to the plaintiff, who was thus compelled to be a witness. This would be entirely conclusive upon the point now under discussion, but for the fact first mentioned by the Chancellor, that the case did not disclose whether the usury, on account of which the defendant sought to avoid the note, had been actually taken, or only secured to be taken. If the latter was the case, he held that the usurer would not be indictable, as the section, of the statute creating the criminal offence, applied only to those who actually received the usurious premium. No protection would be required in such a case; at all events, the Constitution would not stand in the way. But the learned Chancellor added: "In the case now under consideration, I think the witness was compelled to testify, he being the real plaintiff, even if he had received a portion of the usurious premium so as to subject him to indictment under the act of 1837. And provided he

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was not the real plaintiff, but a mere witness, he was bound to testify if he had made a usurious contract merely, without having actually received the usurious premium." None of the other members of the court spoke particularly of the point now in question; but the case, if not a precise authority, shows at least considerable weight of judicial opinion in favor of the judgment of the Supreme Court in the present case.

My conclusion is, that both the judgments appealed from ought to be affirmed.

All the judges concurring,

Judgment affirmed.

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153	877

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The question whether a town has been legally erected may be tested in an action in the nature of *quo warranto* against one claiming to exercise the office of supervisor of such town.

The act of a board of supervisors dividing a town and forming a new one from a portion thereof, only described the dividing line, *held* that the uncertainty was cured by the reference in such act to the petition, &c., upon which it was founded, and from which it appeared that the new town was to lie south of the line of division, and by proof *aliunde* that the place named in the act for holding the first town meeting was south of such line.

The statute (ch. 194 of 1849), does not, *it seems*, require that the published copy of notice of the application of twelve freeholders for the erection of a new town shall contain the names of such applicants. It is sufficient that the notice posted should be thus subscribed.

An affidavit stating that a notice was left with another person to be posted up, "which was done," construed as a positive averment of the posting. The act of the supervisors, is, it seems, one of a legislative character in favor of the regularity of which all presumptions are to be indulged. Those who would impeach it, have the burden of disproving a compliance with the conditions imposed by law as requisite to the exercise of the power.

APPEAL from the Supreme Court. Action in the nature of *quo warranto*, brought by the attorney-general in the name

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of the People to test the right of the defendant to exercise the duties and powers of the office of supervisor of the town of Afton, in the county of Chenango. The complaint alleged that he had unlawfully usurped the duties of the office of supervisor of that town, and prayed judgment that he might be ousted and excluded therefrom. It further alleged that no such town legally exists, and that such acts of the defendant are without authority of law. In answer, it was set up that the town of Bainbridge, in said county, was legally divided by the board of supervisors thereof at their annual meeting in November, 1857, and a new town created therefrom by the name of Afton; that the defendant, at the first town meeting held in said new town, was duly elected the supervisor thereof, and exercises the duties and powers of said office as he lawfully may do. The trial was before Mr. Justice CAMPBELL (without jury) who found the facts, which are sufficiently stated in the following opinion. The judge held, that the formation of the town of Afton was in all respects valid, and that the defendant was duly elected supervisor thereof. The judgment entered by his direction, dismissing the complaint, was affirmed at general term in the sixth district, and the plaintiff appealed to this court.

Henry R. Mygatt for the appellant.

Giles F. Hotchkiss, for the respondent.

DAVIES, J. No question is made upon the legality of the defendant's election; and the decision of the case turns upon the sole point, whether the town of Afton has been legally created. If such an office exists as that of supervisor of the town of Afton, it is not denied that the defendant is entitled to discharge its duties. And it is conceded that the solution of that question depends on the fact whether or not the town of Afton has a legal existence.

It was made a question on the argument, whether this action was the appropriate remedy, to bring up for decision

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that point. It was said, that if there was no such town as the plaintiffs allege, then there could be no office of supervisor of the town, which did not exist; and, consequently, the defendant did not in fact usurp the duties of any office. But we think this objection too technical. The object of the framers of the Code, in the provisions in reference to these actions, manifestly was to provide a speedy and effective mode of determining the claims of persons to exercise the duties of any office within this State; and the determination of the claims of individuals to discharge the duties of any office, would necessarily involve the determination of the existence of the particular office. If the office, the duties of which were usurped and unlawfully exercised, had no legal existence, it would follow that no usurpation was established; and the same result would obtain, if it should be ascertained that the office legally existed, and the party claiming to exercise its duties was lawfully entitled so to do. In either aspect, the determination of the legal existence of the office was involved, and must necessarily be decided. These views received the sanction of this court in the case of *The People v. Draper* (15 N. Y., 582). That was an action under the Code to test the right of the defendants to the office of police commissioners, under an act of the legislature to establish a metropolitan police district. Their right to discharge the duties of the office, and their title to the office, depended on the question, whether or not such an office had a legal existence; and that question was resolved by the determination of the constitutionality of the act of the legislature creating such an office. This court proceeded to the examination and decision of that question; and holding the law creating the office to have been constitutionally passed, declared that the defendants did not usurp and unlawfully intrude into the particular office, and gave judgment in their favor. It might have been said with equal force in that case, as in this, that the office from which it was sought by that action to oust the defendants, was, upon the plaintiffs' own showing, no office at all, but an assumption on the part of the defendants to exercise

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the duties of a mere pretended office; that, therefore, the duties of no actual office were usurped, and consequently the action could not be maintained. We do not yield our assent to this course of argument, but think this the proper action to determine the question as to the right of the defendant to discharge the duties of the office of supervisor of the town of Afton.

This legitimately brings before us for decision, the question whether that town has been legally created and such an office has a legal existence. Previous to the Constitution of 1846, the erection and division of the towns in this State, and the alteration of the boundaries thereof, rested solely with the legislature, and was governed only by its discretion. To relieve the legislature of this branch of administration, purely local in its character, the clause in the Constitution of 1846 was inserted which provides that "the legislature may confer upon the boards of supervisors of the several counties of the State such further powers of local legislation and administration as they shall from time to time prescribe." (Art. 8, § 17.) In pursuance of the authority thus conferred, the act of April 8, 1849 (ch. 194), was passed entitled "An Act to vest in the board of supervisors certain legislative powers," &c. By the first section of this act, the boards of supervisors of the several counties in this State, at their annual town meeting have power within their respective counties, by a vote of two-thirds of all the members elected, to divide or alter in its bounds any town, or erect a new town upon the application of twelve freeholders of each of the towns to be affected by the division, and on being furnished with a map and survey of all the towns to be affected, showing the proposed alterations; and if the application be granted, the board is to cause a copy of the map and a certified copy of the action of the board to be filed with the Secretary of State. It is undeniable that all the provisions of this section have been strictly complied with in the present proceedings. The town of Bainbridge was the only one to be affected by the division, and twelve freeholders of that town made the application "to divide the town of Bain-

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bridge (nearly as the same is now divided into election districts), and to make a new town of the southern portion thereof." It described the portion of the then present town, which they desired to be erected into a new town. It was the southern portion thereof. The board was furnished with a map and survey of the town to be affected, and the application having been granted, the board caused to be filed with the Secretary of State a certified copy of their action, and of said map. This was all this section required. It is now urged that this proceeding is void for uncertainty as the certificate of the action of the board only describes the dividing line, but does not specifically declare which part of the town of Bainbridge is erected into the new town. If there is any ambiguity in this respect, which is not removed by the subsequent part of the certificate, we think the recitals in the act of the board referring to the application of the freeholders, and the notices published and posted, and adopting them as part of the proceedings, which application and notices form a part of the records of the board, are sufficiently explicit to warrant us in regarding the applications and the notices as a portion of the proceedings, and they may consequently be considered *in pari materia*. A reference to them shows that the southern part of the old town was sought to be erected into a new town, and the act of the board must be construed in reference to this application and the notices, which it in terms adopts and makes part of the proceedings. With these aids there is no difficulty in rendering certain and explicit the action of the board of supervisors, and thus clearly ascertaining that it was that portion of the old town lying south of the line described which was erected into a new town.

We think this view is greatly strengthened by the subsequent portion of the act of the board. Section third of the act of the legislature above referred to, declares that whenever the board of supervisors shall erect a new town in any county, they shall designate the name thereof, the time and place of holding the first annual town meeting therein, and three electors of such town (that is of the new town) are to be designated,

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to preside at such meeting, and the board shall also fix the places for holding the first town meeting in the town from which such new town shall be taken. In the act of the supervisors, in the first section thereof, after setting forth the boundary line or line of division between the new and old town, they declare the premises embraced therein to be erected into a new town to be called Afton, and that the remaining part of said town of Bainbridge shall remain a separate town by the name of Bainbridge. Section third declares that the first annual town meeting for said newly erected town should be held at the house of Rufus P. Greene in such town, and appoints the day for holding the same. And by section fourth three persons are appointed to preside at such town meeting. Section fifth designates the place for holding the then next annual town meeting for said town of Bainbridge. Now it appeared on the trial of this action that the place designated for holding the first town meeting in said new town, was south of the said division or boundary line, and that the persons designated to preside thereat, all resided south of said line, and that the place for holding the next annual town meeting for said town of Bainbridge was north of said division line. Reading, therefore, the act of the board in connection with the well established and authenticated facts, there remains no uncertainty as to which part of the old town of Bainbridge was set apart for, and erected into, a new town, and which part remained and continued the town of Bainbridge.

There remain to be considered the questions arising upon the alleged defective notices and proof of posting. The second section of the act of the legislature above referred to, provides that notice in writing of the intended application to the board of supervisors, subscribed by at least twelve freeholders of the town to be affected, shall be posted in five of the most public places in the town to be affected, for four weeks next previous to such application, and a copy of such notice shall also be published for at least six weeks successively immediately before the meeting of the board in all the newspapers of the county, not exceeding three. The first objection urged in reference to

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the notice is, that the copy of the notice published in the newspapers was not subscribed by twelve freeholders. A conclusive answer to this objection is, that the statute does not require the copy of the notice to be published, to be subscribed by the freeholders. The notice posted must be subscribed by not less than twelve freeholders, but no such subscription is required to the copy of the notice to be published in the newspapers. The notices published were, therefore, in conformity with the statute. The affidavits in the case show that five notices were posted in the town, subscribed by the requisite number of freeholders. A criticism was made in reference to the affidavit of posting of one of the notices, which was stated to have been left with another person to be posted up, which (the affidavit states) "was done." We think this a positive averment by the defendant that the notice was posted. It states unequivocally that it was done, and nothing appears to the contrary.

But we apprehend that the validity of the act of the supervisors does not depend upon the sufficiency of these affidavits. There is nothing in the act of the legislature which requires such proof to be made to them, and if no evidence had been offered of the publication and posting of the notices, we should be warranted in assuming that all the preliminary steps required had been taken. The act of the board was one of legislation and the validity of a legislative act cannot be impeached by an omission to show that the preliminary notices, required to be given prior to the application for the law, had been given. Those who challenge the existence of the law, were called on to show the notices were not given. It was not for those acting under the law to make this proof, even if it were necessary. But it is not essential to the validity of the act that proof of the publication and posting of the notices should be furnished. "*Omnia præsumuntur rite, et solemniter esse acta donec probatur in contrarium.*" In *Smith v. Helmer* (7 Barb., 416), it was urged that an act of the legislature could not be given in evidence for the want of proof that notice of the application therefor had not been given pursuant to 1 Revised Statutes, 155, section 1. The Supreme Court held that such proof was unnecessary.

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Again, the provisions of the act in reference to giving the notices by publication and by posting may be regarded as directory merely, and not as conditions precedent to giving the board jurisdiction of the subject matter. The seventh section of the amended charter of the city of New York (Laws of 1830, ch. 122), enacted that on all votes of the common council of said city imposing any assessment, the ayes and noes should be called, and the resolution with said notes should, immediately after the adjournment of the common council, be published in all the newspapers employed by the common council. In *Elmendorf v. The Mayor, &c.* (25 Wend., 693), an assessment had been imposed by the common council, and it was objected to its legality that these formalities had been omitted. The Supreme Court held the statute merely directory and not imperative, or a condition to the validity of the ordinance. The same point was decided in *Striker v. Kelly* (7 Hill, 9).

Upon any view which we can take of this case, we are of the opinion, that the judgment of the Supreme Court is correct, and should be affirmed.

COMSTOCK, Ch. J., DENIO, LOTT, JAMES, MASON and HOYT, concurred; three of them, however doubting whether the published notice was not defective in not containing the names of the subscribers, but regarding the statute on this point as directory; SELDEN, J., was absent.

Judgment affirmed.

THE PARK BANK IN THE CITY OF NEW YORK v. WOOD.

The act (ch. 654 of 1853), allowing corporations which have not received net annual profits equal to five per cent upon their capital, to commute for taxes is applicable only to corporations which have been in existence for a full year before the assessment is made.

Held, accordingly, that a bank which had been organized only three months was liable to be taxed for the full amount of its capital, though its income and profits were less than five per cent.

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APPEAL from the Supreme Court. Case agreed upon pursuant to section 872 of the Code, and submitted without action. The Park Bank claimed that it was not liable to taxation on its capital stock until one year from the date of its commencing its banking business on the 31st of March, 1856. In July, 1856, it was assessed upon such capital by the assessors of the City of New York, the tax amounting to \$21,000. It claimed to commute by paying \$2,400, being five per cent upon the net profits or clear income which had accrued from its business. This claim being rejected by the board of supervisors, the case was submitted to the Supreme Court at general term. The decision was against the bank and it appealed to this court.

Charles O'Connor, for the appellant.

Amasa J. Parker, for the respondent.

LOTT, J. It was provided by an act of the legislature, passed July 21, 1853 (ch. 654), that any incorporated company named in an assessment-roll upon proof made to the board of supervisors, as therein required, that it had "not been during the preceding year in the receipt of net annual profits or clear income, equal to five per cent" on the capital stock paid in or secured to be paid in after deducting therefrom the assessed value of its real estate, should be "entitled to commute for their taxes on such capital stock by paying directly to the treasurer of the county in which the business of such company is transacted, a sum equal to five per cent on such net annual profits or clear income, and also such further sum as shall have been assessed on such roll as the taxes on their real estate."

The Park Bank claimed the right of commutation under that act, and in the proof made to the Board of Supervisors of the City and County of New York at their annual meeting in July, 1856, it appeared that it was a banking association duly organized under the general banking law on the 12th of March in that year, but did not proceed to carry on any banking

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business, except to call in its capital and take other steps preparatory thereto, till the 31st day of March thereafter; that its capital stock paid in or secured to be paid in was two millions of dollars, and that its clear income from the period of its organization till the time such exemption was claimed in July amounted to and did not exceed the sum of forty-eight thousand and five dollars and seventy-nine cents, being less than five per cent on its capital after the deduction of the assessed value of the real estate, which was one hundred and twenty-five thousand dollars. Upon these facts, the question is presented whether this bank was entitled to the privileges claimed by it under the provision of the act above referred to. As a general rule the whole of the capital stock of banks, except such as is held by the State or incorporated literary and charitable associations, is liable to taxation, and no regard is had to the time during which they have carried on business. It is the duty of the assessors to include all in the assessment-roll, and they are to be charged by the board of supervisors with their proportional share of the public burdens on such capital. The provision of law above referred to was an innovation upon a long established system and continued in force only till 1857, when it was repealed. (Laws of 1857, ch. 456, § 1.) It was a special privilege granted, and the corporations claiming it were bound to furnish the board of supervisors with the requisite proof to entitle them to it, within two days from the commencement of their annual meeting. It was, therefore, an exception to a general rule, and it should appear that a corporation was clearly within the exception before it should be permitted to discharge itself from its just proportion of the public burden, to the prejudice of other taxpayers. One of the requirements to entitle a bank to its benefit, in my opinion, is, that it should have been in existence for a year previous to the annual meeting of the board of supervisors. The law requires that it should be shown that the company has not been "during the preceding year in the receipt of net *annual* profits or clear income equal to five per cent on its capital stock," &c., and the commutation is to be based on such net annual profits

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or clear income. It contemplates that the corporation shall have been in business during a whole year. It is in such cases only that annual profits or income can accrue. It was no doubt the object of the law to relieve all incorporated companies from taxation on their capital when their business was not sufficiently profitable to justify the imposition of the ordinary burden to which property is subject for the support of government. A year preceding the usual time designated for imposing taxes was fixed as the period for determining that fact, and therefore the annual profits were the test of success, and formed the basis of taxation. Such, indeed, is claimed to be the construction of the law by the bank. It says that "the effect of the words is, and the intent was, that corporate capital should not be fully taxed in its corporate form until it had been one year successfully operating; and that whenever corporate operations were unsuccessful, like indulgence should be allowed." It is claimed, in other words, that if it should appear that corporations which have been in existence for less than a year, have been prosperous and have during the time they have carried on their business, realized more than five per cent on their capital, that they nevertheless could not be taxed on the whole capital, and consequently that their corporate existence for a year and the receipt of profits to the amount specified, were both "prerequisite to *liability*," on the part of a corporate company, to be taxed in the usual way.

Assuming, therefore, that the law in question has application only to such incorporated companies as have been in existence for a whole year preceding the annual meeting of the board of supervisors, it, in my opinion, follows as a necessary consequence that the claim of the Park Bank was properly refused. The fact of such existence during that time is a prerequisite to the right of commutation, and not to the ordinary mode of taxation. The law does not prescribe a new rule of taxing corporations, but merely gives them the privilege of relieving themselves from the operation of that rule upon showing certain facts to the satisfaction of the board of supervisors. In the present case the material fact necessary to be

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shown, the corporate existence of the bank for a whole year, was wanting. There was, moreover, no basis on which the commutation could be made. There were no "net annual profits or clear income" on which it could be estimated. It was impossible, therefore, to include it within the privileged class of corporations, and it has no ground of complaint when it is subjected to the same rule of taxation which is applicable to the community generally. A different construction would lead to results which could not have been intended by the legislature. The rule contended for by the appellant would relieve all capital that had been invested in an incorporated company at any time within the year, from its ordinary burden of taxation, although profits far exceeding five per cent had accrued thereon both before and after its investment.

The law should not be so construed as to produce such a result if any other meaning can reasonably and fairly be given to it, and the views above expressed show that such a construction is not only unnecessary but unwarranted.

The judgment of the Supreme Court should therefore be affirmed, with costs.

All the judges concurred, except

Selden, J. (Dissenting.) According to the statement contained in the case, it was shown by the affidavit of the cashier "to the satisfaction of the board of supervisors, that the said corporation had not been, during the preceding year, in the receipt of net annual profits or clear income equal to five per cent on the capital stock of said corporation paid in, or issued to be paid in" after deducting the assessed value of its real estate. This brought the bank plainly within the terms of the Act of 1853. The supervisors could not have rejected the claim to commute on the ground that the case did not come within the letter of the act, because the affidavit, as stated in the printed case, was in precise accordance with the language of the act. It contained everything which the statute in terms requires to be shown, and its statements were borne out by

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the conceded facts of the case. The bank clearly had not "during the preceding year" received annual profits equal to five per cent upon its capital.

The only ground, therefore, which the supervisors could take in refusing the claim to commute was, that although the statute, in terms, embraces every corporation, for however short a time it may have existed, nevertheless it was intended to apply only to corporations which have existed for an entire year prior to the period of assessment; and this no doubt is the ground upon which that refusal was actually placed.

The power of construing statutes according to their spirit and intent in opposition to their letter, is one to be exercised with great caution. The language of legislatures is the best evidence of their intention, and it is only where it is clear that something different was meant, that courts are justified in departing from it. Sometimes where—from a consideration of the subject matter of a statute, and the general scope of its provisions—its precise object is plain, courts are warranted in adopting a construction at variance with the strict, literal import of its terms, if necessary to accomplish that object. There are however, few statutes which are less likely to present such a case than those which relate to taxation. As the power of the legislature to tax, or exempt from taxation, is entirely unlimited, and as it is impossible that the laws on that subject should be so adjusted as to operate with perfect equality, it would be dangerous to depart from the letter of such a statute, upon any considerations of mere justice or equity. Unless the motives and intent of the legislature are plain, and the court can see with perfect distinctness that the language used does not express that intent—if the intention is in any degree a matter of speculation—the only safe course is to interpret the statute according to its letter.

The act under consideration provides that any corporation which shall show by affidavit that it has not during the preceding year made an annual profit or clear income equal to five per cent upon its capital, shall be entitled to commute. The respondents contend that this means any corporation

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which has existed for a year. Upon what ground can this be claimed? There is nothing in the language which imports it. It is not implied, as the counsel seem to suppose, in the word "during," or "annual." These words simply measure the period within which the profits must have accrued. Only such are to be estimated as have accrued within the preceding year, and they must be strictly annual profits, that is, profits belonging appropriately to the business of the year for which they are estimated. The words do not necessarily mean anything more than this.

The construction contended for, therefore, can only be claimed upon the ground that the act, if interpreted literally, is unreasonable: that it would operate unequally or unjustly. But how is it possible for the court to say, that the legislature may not have had reasons for extending some indulgence to corporations just commencing their business. Some time is necessarily lost in taking private capital and investing it in the business of a corporation. It takes time to organize a corporate body, and to put its machinery in operation. Corporations are created, or supposed to be created, for public purposes, and whether they should be encouraged or not is a question for the legislature alone.

If the respondents are right, the affidavit produced by the corporation must show not only that such corporation has not made profits during the year equal to five per cent (which is all that the language of the act requires), but the additional fact, that the corporation has existed for an entire year; concerning which there is not a word in the statute. This requirement must be interpolated, therefore, purely on account of its supposed reasonableness, in order to justify construing the statute as contended for by the respondents. It would require, I think, clearer evidence of the legislative intent to warrant such an interpolation, even if this statute did not relate to taxation. But when it is considered that taxation is a power which the government exercises in its own favor: that its discretion is unlimited; and that in this form it may take from the citizen whatever it pleases, it is no more than reasonable that statutes

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imposing taxes, if ambiguous or of doubtful import, should be construed most favorably to the party to be taxed.

The judgment in this case should, I think, be reversed, and judgment should be rendered for the plaintiffs for the sum of \$21,360, with interest from the 2d September, 1857.

Judgment affirmed.

24	100
110	30
110	315

GUENTHER v. THE PEOPLE.

Upon an indictment containing nine counts for embezzlement of different grades, and others for larceny, a verdict "guilty of embezzlement" is equivalent to an acquittal of the larcenies charged, and a bar to any subsequent prosecution.

One of the counts for embezzlement being good, the verdict means that he is guilty of the offence as charged therein.

An entry by order of the court after the jury was discharged, in amendment of the verdict as first recorded, that "the jury find the prisoner not guilty of the larceny charged," is unwarranted and nugatory.

WRIT of error to the Supreme Court. The plaintiff in error was arraigned and put upon trial at the Erie Oyer and Terminer, on an indictment containing twenty-three counts; nine for embezzlement of different sums of money at different times and fourteen for larceny. The jury rendered a verdict "guilty of embezzlement," which was entered by the clerk, and the jury were then discharged. Afterwards, and during the term, the court, on motion of the district attorney, directed the clerk to make the following further entry after the finding of the jury, viz.: "the jury find the prisoner not guilty of the larceny charged," which was accordingly done. The court had charged upon the trial that the prisoner could not be convicted of larceny. Upon this conviction the prisoner was sentenced to the State Prison.

The prisoner brought error to the Supreme Court, where the conviction was affirmed, and he brought error to this court.

The grounds of error alleged were:

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First. That the verdict was erroneous and void, because it did not dispose of all the issues wherewith the jury were charged.

Second. That the verdict was void for uncertainty, because it did not find that the indictment or any part of it was true, but only that the defendant was "guilty of embezzlement."

John L. Talcott, for the plaintiff in error.

Henry W. Rogers, for the People.

JAMES, J. The first count in the indictment for embezzlement was good. Whether or not the other counts for that offence were good is of no importance, because the verdict was general as to embezzlement, and after a general verdict of guilty the conviction will be sustained, if there be one good count, even though the indictment contain many defective ones. No objection was made to any of the counts for larceny.

The addition made to the verdict by the court after the discharge of the jury was clearly irregular, and must be disregarded. The act was wholly without authority and without precedent.

The indictment contained counts for both embezzlement and larceny; the prisoner was tried for both offences; evidence was given endeavoring to establish both, which was submitted to the jury. Finding the prisoner guilty of embezzlement was equivalent to a verdict of not guilty of the larceny charged. No other construction can be put upon the verdict. The question of guilt or innocence of both offences charged was submitted to the jury, and that body found him guilty of but one, and designated which. Trial and conviction upon this indictment is a bar to any subsequent prosecution for the larceny therein charged. (*U. S. v. Keen*, 1 McLean, 429; 2 Caines, 304; 18 J. R., 187, 206.) Not only may a verdict of guilty be rendered on one count and not guilty upon another, but if the jury find the prisoner guilty on one count, and say nothing in their verdict concerning the other counts, it will be equivalent to a verdict of not guilty on such counts. (*Morris v. State*, 8 Smede & Mar., 762; 7 Blackf., 186; 9 Leigh, 627; 4 Scam., 168.)

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The verdict is not void for uncertainty. It finds the prisoner guilty of an offence charged in the indictment, and means that offence as charged therein. Its effect is the same as would be a verdict of guilty under a single count. The words "of embezzlement" were added to designate to which offence they intended the verdict to apply.

The judgment should be affirmed.

All the judges concurred, except

SILDEN, J. (Dissenting.) It is unnecessary in this case to determine whether the judge was right in directing a verdict of not guilty to be entered upon the counts in the indictment charging the defendant with larceny. If the proceedings as had, operate as a virtual acquittal of the plaintiff in error upon the charge of larceny, and are as effectual to protect him from a second indictment for that offence as if a verdict of not guilty had been actually found, he could then have no legal reason to complain that judgment was rendered against him upon that portion of the charge upon which he was found guilty.

But it is contended by the counsel that there is no mode in which the plaintiff in error could avail himself of these proceedings, as a bar to a second prosecution: that the only pleas known to the law in such cases are those of *autrefois convict*, and *autrefois acquit*, and that no plea which does not come up to one or the other of these can amount to a defence. This position cannot, I think, be sustained, either upon principle or authority. The common-law maxim and the constitutional provision, that no man shall be twice put in jeopardy for the same offence, might be effectually evaded, if after entering upon a trial for crime, and finding that the evidence is insufficient, or that the jury would probably refuse to convict, the case can be abandoned, or the jury discharged, and the accused be again brought to trial upon the same charge. He could plead neither *autrefois convict* nor *autrefois acquit* in such a case, and yet if the protection afforded by the Constitution is of any value, he must, when again put upon his trial, be per-

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to avail himself, in some form, of the proceedings upon the first trial as a defence.

It is, notwithstanding the dearth of authority on this subject, enough, I think, to show that the doctrine of the courts is in accordance with the dictates of reason and principle. In the case of *Conway & Lynch v. The Queen* (7 Irish L. R., 149), which was an indictment for murder, a plea that the prisoners had been given in charge to a jury at a previous court, and that the jury after having heard the evidence was discharged without any legal cause, was held to be a good defence; and this decision was cited and commented upon by the English judges in the case of *Mercy C. Newton* (13 Adolph. & Ellis, 716), without any apparent doubt as to its accuracy.

The Supreme Court of Pennsylvania held in the cases of *The Commonwealth v. Cook* (6 Serg. & Rawle, 577), and *Commonwealth v. Clue* (3 Rawle, 498), that when upon a trial for crime the jury are improperly discharged without finding a verdict, if the prisoner is again brought to trial upon the same charge, he may plead the proceedings upon the first trial in bar of the second; and although the courts of this State differ with those of Pennsylvania in respect to the right of a judge to discharge a jury in a capital case, for the reason that they are unable to agree, they nevertheless concur with these courts in the doctrine, that when the jury have been improperly discharged after hearing the evidence upon one trial, the prisoner may avail himself of the proceedings upon the first trial, as a protection against the second.

It is true, that in the case in which this was held, viz.: *The People v. Barret & Ward* (2 Caines, 304), the question arose not upon a plea but upon motion in arrest of judgment. But if the objection was good in arrest, it follows that it must be equally good if set forth in a plea. There are many objections which, although good if pleaded, are not available in arrest of judgment; but there is, I apprehend, no case in which the converse is true, where the facts upon which the defendant relies occurred before pleading. It may be regarded as clear that a plea setting forth in a proper manner, the proceedings

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had upon the trial of the indictment against the plaintiff in error, would be a bar to a second indictment for the crimes charged in the first. There is, therefore, no ground for reversing the judgment for the reason that the verdict of the jury is silent as to the counts for larceny.

But there is another objection to the judgment, which it is not so easily to surmount. I have, thus far, assumed that the verdict as entered was equivalent to a general verdict of guilty upon all the counts in the indictment charging the prisoner with embezzlement. It is, however, insisted that the verdict was void for uncertainty; and that no judgment could properly be pronounced upon it. The verdict as entered upon the record is, "that the said Nelson J. R. Guenther is guilty of embezzlement." If this is equivalent to a verdict that the prisoner was guilty of the embezzlement charged in the indictment, it is undoubtedly sufficient, although several of the counts for embezzlement were defective; as such a verdict would convict the prisoner of all that is charged against him, and hence if there is one good count he may be sentenced upon that. But verdicts, especially verdicts in criminal cases, are for obvious reasons regarded with great strictness. In construing them every intendment is in favor of the prisoner, and nothing whatever is to be taken by implication against him. This is a universal rule, and is without exception. In the case of *Rex v. Francis*, which was an indictment for robbery, the court refused to intend that Cox, the party robbed was present when the money was taken, although the jury expressly found, that the prisoner, after knocking the money out of Cox's hand, and preventing him by threats from taking it up, "immediately" took up the money himself.

The Supreme Court of Massachusetts held, in the case of *Commonwealth v. Call* (21 Pick., 509), that a verdict finding the defendant guilty of everything charged in the indictment, but omitting to state in express terms, that the crime was committed in the county, where the indictment was found, was too defective to support the sentence founded upon it; and in the case of *Dyer v. The Commonwealth*, upon an indictment for receiv-

ing goods, burglariously stolen, knowing them to have been stolen, the verdict was in these terms: "The jury find the said D. guilty of receiving and aiding in concealing stolen goods, knowing them to have been stolen, but not knowing them to have been burglariously stolen." The court held this verdict to be fatally defective, because it did not find that the defendant had received the goods described in the indictment. This last case can scarcely be distinguished, in principle, from that under consideration. The verdict here has the same defect, and cannot be sustained without overruling the Massachusetts case.

But the decision in that case is not only supported by the English cases, but was, as it seems to me, clearly right upon principle. To have held otherwise would have been to reverse the rule that the court cannot supply a defect in the finding of the jury in a criminal case, by intendment or implication. The case now before the court is a strong case for the application of this rule. Had there been but one charge of embezzlement, the probability would have been very strong that the jury by their verdict, that the prisoner was guilty of embezzlement, meant the embezzlement charged in the indictment. This would, however, even then, have been no more than a probable conjecture. The language in no manner implies such an intent, even if implications were admissible in such a case. But here the charges of embezzlement were various, and of different grades; and I see nothing in the verdict to raise even a strong probability that the jury intended to find the prisoner guilty upon all the charges; and this is indispensable to the support of the judgment.

It is true, that a general verdict of "guilty" is said to convict the prisoner of all that is charged against him. But this is because such a verdict is uniformly entered upon the record as a verdict that the prisoner is "guilty of the charge *set forth in the indictment*," or "in manner and form as charged in the indictment," or something equivalent to this. This reference in a verdict to the charge in the indictment is, I apprehend, necessary; and hence it is that the clerk of the court in all

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cases, both in England and in this country, after the jury have announced a verdict of guilty, first enters the verdict in form in the minutes of the court, and then calls again upon the jury to assent to the verdict as it has been recorded. It has, I think, never been held that a general verdict, entered upon the record in the language in which it is first delivered by the jury, merely finding the defendant "guilty," without in some manner showing the offence of which he is convicted to be that for which he has been indicted, would be sufficient. Such a decision would be in direct and palpable conflict with the whole current of authority on the subject, both ancient and modern. The judgment of the Supreme Court should be reversed, and the prisoner should be discharged.

Judgment affirmed.

CORCORAN v. JUDSON.

Reasonable counsel fees incurred in the defence of a suit to restrain the payment of an award, are recoverable upon a bond conditioned for the payment of all costs and damages arising from the obligor's obtaining an injunction or from his contesting the payment.

APPEAL from the Superior Court of the city of New York. On the trial, before Mr. Justice HOFFMAN, without a jury, these facts appeared: The commissioners, appointed under the act of Congress, of March 3d, 1849, to carry into effect the treaty between the United States and Mexico of February 2d, 1848, on the 15th of April, 1851, made an award in favor of the respondent, in the sum of \$15,041. The appellant claimed a part of that sum, to wit: \$7,887.50, and notified the Secretary of the Treasury of his intention to contest the payment thereof. In accordance with the provisions of the act, the appellant made and executed a bond, with sureties, conditioned that if he should file a bill and obtain an injunction restraining the payment of said money to the plaintiff, he would pay, or cause to

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be paid to him, all costs and damages, arising from the defendant's claim, or from his notification to the Secretary of the Treasury, or from his contesting the payment of said sum to the plaintiff.

The defendant filed his bill in the Circuit Court of the United States in the District of Columbia, and obtained an injunction restraining the payment of said money, and such proceedings were had in such court, that the bill was dismissed, with costs, and on appeal to the Supreme Court of the United States, the decree was affirmed. The plaintiff claimed that he had sustained damage in consequence of the defendant contesting such payment to him according to the condition of the bond, as follows: Legal interest on the sum in contest, amounting to the sum of \$2,208, and the sum of \$2,000 paid by him as counsel fees in and about the defence of said action. The judge at the trial, found that the plaintiff was entitled to recover the interest amounting to \$1,892.88, taxed costs in the action, \$184.24, and the sum of \$1,500 for counsel fees, and found, as matter of fact, that the latter sum was a reasonable amount to be allowed the plaintiff for such counsel fees. Judgment was entered at special term in favor of the plaintiff, which was affirmed at general term, and the defendant appealed to this court.

John H. Reynolds, for the appellant.

Henry Nicoll, for the respondent.

DAVIES, J. The only point made on the argument is whether counsel fees paid by the plaintiff are covered by the words in the condition of the bond, "costs and damages," I cannot doubt that they are. The bond was to indemnify the plaintiff for the expenses and damages to which he might be subjected by the proposed contestation. It was in contemplation of the defendant to institute legal proceedings, thereby subjecting the plaintiff to costs, and the employment of counsel. He would be necessarily damnified in consequence there-

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of, to the amount he should be compelled to pay such counsel. It was a damage clearly within the contemplation of the act, and of the parties. Sedgwick on Damages (p. 177), lays down the rule that in an action of covenant for breach of warranty, where a former suit has taken place which the covenantee has been obliged to defend, not only his costs but his counsel fees may be recovered in the proceeding on the covenant itself.


Edwards v. Bodine (11 Paige, 224), is not unlike the present case. There an injunction master, on issuing an injunction, took from the party applying for it, a bond to the defendant, conditioned to pay the parties enjoined such damages as they might sustain by reason of the injunction. The court dissolved the injunction and decided that the party suing it out was not entitled to the writ. An order was then obtained referring it to a master to ascertain what damages the party enjoined had sustained by reason of the injunction. This proceeding was a substitute for an action on the bond. The master allowed the counsel fees paid by the party procuring the injunction to be dissolved, and this allowance was affirmed by the Chancellor. He says "as the counsel fees are clearly covered by the condition of the bond, I cannot disallow them without depriving the party of a legal right. By the Code (§ 222), when an injunction order is made, it is the duty of the court, or judge making the order, to take a written undertaking, with or without sureties, to the effect that the plaintiff will pay to the party enjoined, such damages not exceeding the amount specified, as he may sustain by reason of the injunction. Under this section of the Code, the practice is universal, to allow the party enjoined as part of his damages, the counsel fees he has been subjected to, in consequence of the issuing of the injunction. In accordance with this rule is the case of *Coates v. Coates* (1 Duer, 664).

The judgment of the Superior Court should be affirmed, with costs.

MASON, J. This is a very broad bond. In it the defendants agree to pay the plaintiff all damages arising from his claim-

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ing this fund, or from his notifying the Secretary of the Treasury thereof, or from his contesting the payment thereof to the plaintiff by the government. It is broad enough to protect the plaintiff from any injury he may have sustained by reason of the defendants' claiming this fund and contesting the payment thereof to the plaintiff. It is broader in its language than the common injunction bond issued under the requirement of the 21st Rule of the late Court of Chancery in this State. The condition of the bond under that rule was "*to pay the party enjoined such damages as he may sustain by reason of the injunction.*" Such a bond was held by the Chancellor in the case of *Edwards v. Bodine* (11 Paige, 224), broad enough to embrace the necessary counsel fees incurred by the defendant in getting rid of the injunction. The language of this bond is broader than the undertaking required by the 22d section of the Code on procuring an injunction, which is to the effect that the plaintiff will pay to the party enjoined such damages as he may sustain by reason of the injunction, and it has been frequently held that counsel fees incurred in the defence of the suit to get rid of the injunction were covered by such undertaking. (*Coates v. Coates*, 1 Duer, 664.) In the case at bar the defendant is clearly liable on his bond for all damages which have arisen to the plaintiff by reason of the defendant claiming this fund and contesting the payment thereof to the plaintiff. It is clearly broad enough to embrace those counsel fees which the plaintiff has been obliged to pay out in defending the suit, which the defendant brought against him to establish his claim to this fund. The necessity of paying such counsel fees is an actual damage which the plaintiff has sustained by reason of the defendants' bringing a suit against him and contesting this claim with him, and they are damages which legitimately arose from the defendants' bringing that suit and contesting his claim to this fund. In the case of the *Trustees of the Village of Newburgh v. Gallatin et al.* (4 Cow. R., 340), which was an action upon a bond to indemnify and save harmless against all actions, suits and damages in consequence of certain acts, the court held that the bond



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extended to the costs of defending a groundless suit for an act in which the obligee succeeded. The 35th section of 2 Revised Statutes, 618, provided that upon certain appeals to the Court for the Correction of Errors, the appellate court might in its discretion award damages to the respondent upon affirming the decree, for the delay and vexation caused by such appeal. Under this statutory provision the Court for the Correction of Errors has allowed to the respondent on appeal a sum in damages to cover his extra counsel fees. (*Boyd v. Brisban*, 11 Wend., 529; *Murray v. Mumford*, 2 Cow., 400.) In *Staats v. The Ex'rs of Ten Eyck* (8 Caines R., 118), it was held under a covenant of warranty in a conveyance, that the grantee who had been evicted was entitled to recover against his grantor his costs and reasonable fees of counsel which he had been compelled to pay in defending his title, as a part of the damages which he had sustained by the breach of the covenant of warranty. These cases seem to me fully to justify the construction put upon this bond by the court below, and the judgment should be affirmed.

DENTON, LOTT and JAMES, Js., concurred; COMSTOCK, Ch. J., SELDEN and HOYT, Js., dissented.

Judgment affirmed.

MILLER & LUTHER v. EARLE *et al.*

A judgment by confession entered upon an insufficient statement, but not impeached for actual fraud, is good as between the parties.

Where the property of the defendant has been sold under an execution upon such a judgment, the purchaser's title cannot be impeached by a creditor having no judgment or lien on the property at the time of the levy.

APPEAL from the Supreme Court. The complaint stated a judgment by confession against James Heth, on the 23d of

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August, 1855, in favor of the defendants in this action, upon which execution was issued, and Heth's property sold by the sheriff, and the proceeds of sale paid over to the defendants. That on the 8th of November, 1855, the plaintiffs recovered a judgment against Heth, and issued execution thereon, which was returned unsatisfied. The complaint set out the confession of the judgment by Heth to the defendants, and claimed that it did not conform to the provisions of the Code, and that it was, therefore, void: and the plaintiffs in this action claimed that the money so received by the defendants from the sheriff on the void judgment and execution, should be applied and paid over in satisfaction of the plaintiffs' judgment. The defendants demurred, alleging that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained at special term, and judgment given for the defendants, which was affirmed at general term. The plaintiffs appealed to this court.

George W. Stevens, for the appellants.

R. H. Bourne, for the respondents.

DAVIES, J. At the time of the sale of Heth's property, and the payment of the proceeds over to the defendants in this action, it does not appear that these plaintiffs were in a position to challenge or object to that sale and payment. If Heth chose to adopt this form of paying the defendants the amount he owed them, it is not perceived that any objection can be taken by these plaintiffs to such payment. Heth certainly would be estopped from alleging or setting up that the judgment was not valid, or, in other words, was not a judgment, and after he stood by and saw his property sold under an execution issued upon it, and the proceeds paid over to the defendants, he would be estopped from recalling such payment. The plaintiffs are certainly in no better position than that occupied by Heth, and as the transaction was completed before

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the recovery of the plaintiffs' judgment, they are not in a position to impeach it. The judgment appealed from should be affirmed.

JAMES, J. Proceeding by action is a proper mode of testing the validity of the senior judgment. (*Dunham v. Waterman*, 17 N. Y., 9, 14, 15.)

On the entry of a judgment by confession, the Code (§ 383) requires from the defendant a statement in writing, verified, of the facts out of which the indebtedness confessed arose. The statement on which the judgment sought to be set aside was entered, is as follows: "This confession of judgment is for and upon a balance of account against me, * * * * for goods, wares and merchandise purchased by me of them." This does not fulfill the requirement of the statute. Although it stated, and no doubt truly, the facts upon which the indebtedness existed, it did not give the facts out of which that indebtedness arose or originated. It does not state when the goods were bought, the terms, the amount, quantity or kind: and although the confession purports to be for a balance, it does not allege or show any payments made, nor state how such balance was ascertained. In fact, the statement is as broad and general as a declaration containing simply the common counts. It furnishes no data whereby its truth can be tested, or the actual amount, if anything, due the plaintiffs, ascertained. The statement is clearly insufficient within all the cases decided in this court. (*Chappell v. Chappell*, 2 Kern., 215; *Dunham v. Waterman*, 17 N. Y., 9; *Lanning v. Carpenter*, 20 N. Y., 447; *Freligh v. Brink*, 22 Id., 418.)

As between the parties themselves, however, the judgment confessed should be held legal and valid; that being so, the levy and sale of property under it was good as against the defendant, and all the world, except judgment creditors existing and having a lien upon his property. Until the plaintiffs had recovered their judgment against Heth, they had no lien upon his property. Until then he had a right to dispose of it

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or its proceeds, in payment or satisfaction of his debts, or in any other way not fraudulent.

What was said by this court in *Chappell v. Chappell* (4 Kern., 215), that a judgment entered upon an insufficient statement was to be deemed fraudulent and void as to other judgment creditors of the defendant, must be limited in its effect to such property of the judgment debtor as remained undisposed of at the time of obtaining such other judgments, and cannot be construed as intending that money made and paid over under such confessed judgment, prior to any lien acquired by the other judgment could be recovered by them.

The complaint does not aver that their judgment was confessed with a fraudulent intent: it is claimed to be void by reason of an insufficient statement of confession; no other fraud is charged. It was held in *Ames v. Blunt* (5 Paige, 18), that "although an assignment for the benefit of creditors was fraudulent as to those who do not assent to it, the assignees are not answerable for the proceeds of assigned property actually paid to *bona fide* creditors of the assignor pursuant to the assignment, before any others have obtained either a legal or equitable lien on such property, or the proceeds thereof."

The Chancellor in *Wakeman v. Grover*, declared an assignment for the benefit of creditors void, but decreed that the assignee be allowed all payments made under it to the creditors of the assignor previous to filing the bill to set it aside; and that decree was affirmed by the court of last resort. (*Grover v. Wakeman*, 11 Wend., 187, 190, 226.)

These cases proceed upon the theory that the legal and equitable rights of the plaintiffs have not been defrauded by such distribution; upon the principle that the property assigned had been distributed according to the direction of the assignor in payment of *bona fide* creditors, to whom such proceeds might have been lawfully distributed by the assignors themselves at any time before the complainants obtained any legal or equitable claim thereon. So in this case, the debt for which the confession was given being *bona fide*, the property levied upon might have been lawfully applied by the judgment

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debtor, without judgment, to the payment of such debt at any time before the plaintiffs in this case obtained any legal or equitable lien thereon; and the proceeds of such property having been applied to the payment of such *bona fide* debt, through the instrumentality of a defective judgment before any legal or equitable lien was obtained upon it by any other creditor, the property cannot be recalled, nor its proceeds recovered by a subsequent judgment creditor, although the prior judgment is void as to him, for any remaining property of the judgment debtor undisposed of.

DENIO, LOTT and HORT, Ja., concurred; COMSTOCK, Ch. J., and MASON, J., dissented.

Judgment affirmed.

94	114
114	134

THE PEOPLE, *ex rel.* FIEDLER, v. MEAD *et al.*

Chapter 375 of 1852, required the raising by tax on the town of Genoa of the interest on certain bonds of that town, the money to be received and paid to the bondholders by commissioners appointed for that purpose. The money having been raised, it seems that mandamus to the commissioners is the proper remedy to enforce payment and not an action against the town.

The act directing the commissioners to issue bonds "under their official signatures," is satisfied, it seems, by instruments not under seal, and payable to bearer.

The decision in *Starin v. The Town of Genoa* (23 N. Y., 439), reiterated that a certificate, required by the statute, but not made evidence, that the taxpayers had assented to the issue of the bonds, is not proof for a *bona fide* holder of the fact of such assent.

APPEAL from a judgment of the Supreme Court, by which a peremptory mandamus was awarded, requiring the defendants, as the supervisor and railroad commissioners of the town of Genoa, in Cayuga county, to pay to the relator, \$500, alleged to be due him from the town of Genoa for interest upon eight obligations of said town for the payment of \$1,000 each, held

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by the relator, which interest fell due on the first day of January and the first day of July, 1856, and for which the relator holds coupons attached to the principal obligations. The obligations purport to have been issued pursuant to an act of the legislature passed in the year 1852, entitled "an act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie or Cayuga and Susquehanna railroad" (ch. 375). They are in the form of corporate or municipal bonds, except that no seal was attached to them; and they are payable to Ashbel Avery, or bearer. The coupons are in the form of due bills, payable to bearer, and there is one for each half year's interest.

The act referred to provides that the assessors of any town in Cayuga county (who were made commissioners for that purpose), in conjunction with the supervisor, may borrow on the faith and credit of the town, a sum not exceeding \$25,000, for not more than twenty years and at an interest not greater than seven per cent, "and they are to execute therefor, under their official signatures, a bond or bonds on which the interest shall be made payable annually, or semi-annually, &c. The moneys to be borrowed are to be paid over to the president and directors of such railroad company, organized under the general railroad law, as shall be expressed by the written assent of two-thirds of the resident taxpayers of said town, to be expended in constructing and maintaining a railroad passing through the city of Auburn, and connecting lake Ontario with one of certain other railroads mentioned, "provided always, that the said supervisor and commissioners shall have no power to do any of the acts authorized by this act until a railroad company has been duly organized according to the requirements of the general railroad law for the purpose of constructing the aforesaid described railroad, and the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll of such town, made next previous to the time such money may be borrowed shall have been obtained by said supervisor or commissioners, or some one or

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more of them, and filed in the clerk's office of Cayuga county, together with the affidavit of such supervisor or commissioners, or any two of them attached to such statement, to the effect that the persons whose written assent are thereto attached and filed as aforesaid, comprise two-thirds of all the resident taxpayers of said town on its assessment-roll next previous thereto." (§ 1.)

The commissioners are authorized to subscribe to the capital stock of the railroad company in behalf of the town to an amount equal to the aggregate of the bonds, and the supervisor is to act in behalf of the town, at meetings of the stockholders. (§§ 2, 3.)

The board of supervisors of the county are to cause to be raised, annually, from the taxable property of any town which shall borrow money under the act, sufficient money to pay the interest on its bonds, as it shall become due. The money so received is to be paid to the supervisor and commissioners of the town, who are to pay the interest on the bonds as it shall fall due. (§ 4.) Provision is also made for eventually raising money to repay the principal to be borrowed.

Duplicate copies of the bonds to be issued by any town are to be filed in the county clerk's office, and the supervisor of each town, which has been a borrower under the act, is to report annually to the board of supervisors, the amount necessary to be raised in his town to pay interest on the bonds. (§ 8.) The remainder of the act is devoted mainly to detailed directions for managing the railroad stock which the borrowing towns were expected to acquire. The town assessors, who, at the outset were to act as commissioners, in connection with the supervisor, are, after the first year, to be replaced by two persons to be chosen expressly as commissioners by the town meeting.

The supervisor and commissioners of Genoa, on the 26th February, 1853, executed twenty-five bonds of the character mentioned, for the payment of one thousand dollars each, the principal payable in twenty years, and the interest semi-annually. They also subscribed for \$25,000 of the capital stock

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of the Lake Ontario, Auburn and New York railroad company, a corporation formed under the general railroad act, which, in respect to the route of its road, fulfilled the conditions prescribed by the act. Twenty-two of the bonds (which included those afterwards purchased by the relator) were in October, 1858, delivered to the treasurer of the railroad company in payment for so much of the stock, the scrip for which was issued and indorsed as paid in full; but there was an agreement, expressed in the receipt given by the company, that it might return the stock at any time within eight months and cancel the indorsement of it on the scrip, and that within the same time the town might take back the stock upon payment of its par value; and also that if the company should sell it for more than par, the town was to have the benefit of the premium. Neither of these reservations were acted upon by either side. The remaining three of the twenty-five bonds were pledged to a bank to raise money to make the cash payment towards the stock required by the act. There was no other borrowing by means of the bonds, than as above mentioned. The treasurer of the company put certain of the bonds into the hands of a broker in New York to sell, and eight of them were purchased by the relator at eighty per cent of the amount expressed to be payable by them, and five per cent in addition on the whole amount was paid by the company as a commission to the broker, for negotiating them.

One of the subjects litigated was whether the assent of two-thirds of the taxpayers had been obtained, as required by the statute. Three papers of similar tenor, each purporting to express the assent of the subscribers to the borrowing by the town of \$25,000 for the purpose mentioned in the act, were produced, with many names purporting to be subscribed to each, to which was annexed an affidavit of the supervisor and assessors of Genoa, by which they deposed that the several persons whose written assent was thereto attached, composed two-thirds of all the resident taxpayers of the town on its assessment-roll made and completed next prior to the date of the affidavit, which was the 11th day of September, 1852.

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These papers were filed in the county clerk's office, and there was attached to each of the obligations a clerk's certificate that such written assent and affidavit had been so filed. Evidence was given tending to show that several of the names of persons purporting to be subscribed, as assenting taxpayers, were not on the assessment-roll for the proper year, and that all the subscriptions to the three papers did not number two-thirds of the persons on the roll for that year. It was proved that the board of supervisors of Cayuga county, at their session in the autumn of 1855, had provided for the raising of the money to pay the interest upon the \$25,000 of bonds which had been issued by the town of Genoa, though the supervisor from that town made no report of the amount required according to the act, and voted against the resolutions for raising the money. The amount so raised was paid over to the county treasurer. The prior interest on the bonds had been regularly raised and paid according to the act.

The issue was made up by the alternative mandamus, the return of the supervisor and railroad commissioners thereto, and the plea to the return put in by the relator.

The trial took place at the Cayuga circuit before Judge WELLES, sitting without a jury. The facts above mentioned, with some others of less materiality referred to in the opinion, appear from the pleadings and the evidence.

In a paper contained in the Case, called the findings and decision of the judge, the execution and issuing of the bonds were found, and that the town of Genoa had complied with the various requirements of the act as mentioned in the writ, and that the relator purchased the eight bonds held by him "in good faith and for a good and valid consideration paid by him, and became the *bona fide* owner and holder thereof." The raising the interest money and the payment thereof to the county treasurer, who held it subject to the order of the defendants, and was ready to pay it to them, and that they refused to receive it were also stated as facts found by the judge. The questions discussed in the opinion were raised upon the trial in the form of objections to reading the obligations in evidence,

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and on a motion for a nonsuit, and for judgment for the defendants, the rulings upon which were against the defendants. Judgment was thereupon given for the award of a peremptory writ requiring the defendants to receive from the treasurer \$560 of the money in his hands, and to pay it to the relator in satisfaction of the interest mentioned in the coupons aforesaid, and judgment for costs was also given against the defendants. The case came here upon an appeal from the judgment of affirmance rendered by the general term.

Warren T. Worden, for the appellants.

Oliver H. Palmer, for the respondent.

DENTO, J. The first question to be considered is, whether, upon the assumption that the obligations held by the relator are valid securities under the act of 1852, the proceeding by mandamus is the appropriate remedy for the relator under the circumstances of the case. It is shown that the money to pay the interest has been collected from the taxpayers of the town, by means of the usual official agencies, according to the directions of the act under which the bonds were issued, and that it has been paid to the county treasurer. It then became the duty (supposing the bonds to be legal), of the defendants—the railroad commissioners—to receive this money from the treasurer and pay it to the creditors who held the bonds. But they refused to perform this duty and the mandamus awarded by the Supreme Court was to coerce them to its performance. It is one of the most usual offices of the writ of mandamus to compel executive and ministerial officers to perform official duties appertaining to their offices, where an individual has a private and a pecuniary interest in such performance; and there can be no doubt but that it is an appropriate remedy in the present case, unless it can be shown that the relator has a complete remedy by action. It is plain that he has not such remedy against the county treasurer, for he stands ready to perform the functions required of him. It is probable that an

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action on the case would lie against the supervisor and commissioners, at the suit of the creditors, but the recovery would not necessarily be the amount due the party for interest on his bond, but a sum for unliquidated damages to be assessed by the judgment of a jury. But a right of action against the officer who ought to perform the duty, can never be an answer to a motion for a mandamus to compel its performance, because if this were so, the remedy would be taken away in nearly every case; for the right to an action for damages generally exists where a party is entitled to a remedy by mandamus against a ministerial officer. In *McCullough v. The Mayor, of Brooklyn* (23 Wend., 458), it was said by Judge BRONSON that, "although, as a general rule, a mandamus will not lie where the party has another remedy, it is not universally true in relation to corporations and ministerial officers. Notwithstanding they may be liable to an action on the case for a neglect of duty, they may be compelled by mandamus to exercise their functions according to law." See, also, the case of *The People v. The Supervisors of Columbia County*, to be presently mentioned for another purpose.

But the principal argument against the right to a mandamus in this case is that the relator has, as alleged, a perfect right of action against the town; and there are cases which favor this view. In *ex parte Lynch* (2 Hill, 45), the legislature had directed the supervisors of the City and County of New York to audit and allow the salaries of the judges of a certain city court, and Mr. LYNCH, one of the judges, moved for a mandamus, and the motion was denied on the sole ground that he had a remedy by action against the city corporation. This is certainly a strong case. The same principle was stated in an opinion in this court. (*The People v. The Supervisors of Chenango Co.*, 1 Kern., 563), but the judgment was, I think, placed on another ground, namely, that the relator had no right to the money which he sought by the mandamus to have raised by the action of the board of supervisors. See, also, *ex parte The Fireman's Insurance Company* (6 Hill, 243), where a mandamus to compel a corporation to transfer stock which the

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relator claimed to be entitled to, was denied, on the ground he had an action against the corporation for a refusal to make the transfer. But I do not think these cases are fully in point against the plaintiff. None of them present the case of a proceeding prescribed by statute for raising money by a local tax for the benefit of a class of creditors, where that proceeding has been carried on according to law nearly to its completion, where it has proved effectual in raising the money from the taxpayers who were the proper parties charged with its payment, and where the only step wanting to produce satisfaction to the creditor is the payment of the money, so raised, into his hands. If the defendants are allowed to persist in refusing to make payment, on the ground that the relator has a right of action against the town, and they should act on that suggestion and prosecute the town, the anomaly would be presented of the legal pursuit by a creditor of money owing by the town, which it had already raised and collected from the taxpayers and placed in the hands of a public officer for the purpose of being paid to his creditors—all in performance of specific statutory directions—but where in consequence of the perversity of the official persons, whose duty it was made to pay it over, it could not be obtained by the creditor. Upon the argument of the defendant's counsel, judgment must be recovered against the town, which would have no means of satisfying it without further legislation, while at the same time the money collected specifically to pay such creditor must remain in the hands of the treasurer, no person being by law entitled to take it from him except these official persons, who refuse to have anything to do with it. It seems to me one of the most appropriate cases for the remedy by mandamus against the recusant officers which can be conceived. The remedy against the town, conceding that an action will lie against it, is inadequate; for towns are not presumed to have any property liable to seizure on executions, and they have no power of taxation which would enable them to raise this money again. In the cases *ex parte Lynch* and *ex parte The Fireman's Insurance Company*, the parties to whom the applicant for a mandamus was

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referred, as those against which he had another remedy, were regular corporations with a full general liability to be sued, and in judgment of law had sufficient property to pay his claim; but a town has only limited corporate powers, and no powers whatever to become a debtor for borrowed money, or to provide for the payment of such a debt except what is conferred by the act of 1852 (1 R. S., 337). That act does not contemplate a suit against the town in any event, and the only method which it provides for the payment of the debts, which it was thereby authorized to incur, was the one which has been pursued nearly to its proper consummation, but which has become ineffectual by the refusal of the defendants to perform the part assigned to them in the detailed arrangements for the satisfaction of the debt. The case is similar in principle, though far stronger for the application of the remedy than that of *The People v. The Supervisors of Columbia County* (10 Wend., 363). A statute had charged upon the respective counties any deficiency which might arise upon the sale of land mortgaged to the commissioners of loans, and had directed that the amount should be raised by the board of supervisors; and the case of such a deficiency having occurred in the County of Columbia, the Attorney-General procured a mandamus to compel the supervisors to do their duty by raising the money to meet the deficiency. The question was presented by a demurrer interposed by the Attorney-General to the return of the board of supervisors; and on the argument their counsel urged that mandamus was not the proper remedy, the county, as they contended, being liable to an action. The answer of the court to this position, as set forth in the opinion of Chief Justice SAVAGE, in giving judgment for a peremptory mandamus, contains all that is necessary to add upon this branch of the case: "Is this a proper case for *mandamus*? It has often been decided in England and by this court, that a mandamus will not be granted where there is a remedy by action. The party asking for a mandamus must have a clear legal right, and no other appropriate specific remedy. (2 Cow., 444; 1 Wend., 325; 7 Term R., 396, 404.) If an action lies in this case then a man-

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damus should be refused. I think an action would not lie. The statute directs the supervisors to levy and collect the amount of the deficiency; it is a duty imposed upon those officers which should be performed by them; but for this neglect, the county, in its corporate capacity, should not be punished; nor does any liability attach to the county to pay the money in any way other than that pointed out in the statute. Should it be thought that the offending supervisors ought to respond personally in damages, which is certainly very questionable, still there is no principle which would graduate the damages to the deficiency which would arise from the mortgage in question; and for aught the court can know, the money possibly might not be collected in that way. Besides, the law does not contemplate satisfaction in any other manner than by an assessment upon the taxable property of the county. An action, therefore, is not the appropriate and specific remedy." If the opinion should be thought to go too far in denying the liability of the county to an action, still the case is an authority for holding that where a particular method of raising money for local public purposes is prescribed by statute, the party entitled to receive it has a right to the full and perfect execution of the power conferred, which may be enforced by the writ of mandamus.

But it is insisted that it was incumbent on the relator to show that he was the holder of the obligations of the town issued under the act, which he had a right to enforce. I will not stop to inquire whether the defendants are not estopped from questioning the validity of the bonds after they have been used with the consent of the officers, as the means of obtaining the plaintiffs' money, and after the taxpayers have contributed, in the manner prescribed by law, to raise a fund for the purpose of reimbursing him; for I think the obligations are perfectly valid.

It is objected that the instruments are unauthorized, because they are not specialties; and it is argued that the word 'bond' used in the act can only be satisfied by an instrument under seal. But the towns do not have and are not supposed to

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possess a common seal. There is no provision for the adoption of one or for its custody. But if the town had a seal it would not have been proper to affix it to these obligations; for the act directs that they shall be executed in another manner, namely, under the official signatures of the supervisor and railroad commissioners, and these instruments were authenticated in that manner. Whatever force there may generally be in the words "bond or bonds," which were used in the act, it is overcome by the explicit direction as to their execution, which has been mentioned.

The obligations were not issued upon the making of a loan of money, but were transferred to the railroad company in payment for the stock subscribed in behalf of the town. In *Starin v. The Town of Genoa*, decided at the last term (23 N.Y., 439), it was the unanimous opinion of the court that this was unauthorized by the statute, and we reversed the judgment which the plaintiff had obtained, for interest payable upon certain of the bonds, on the ground that they could only be legally issued to secure money advanced by way of loan. The propriety of that judgment is exemplified by the facts in the present case, which show that the railroad company realized only \$750 on each obligation for the payment of \$1,000, and that thus the town would be obliged to pay between nine and ten per cent per annum upon the money which came into the hands of the company to be applied towards the improvement in which the town was assumed to be interested, besides being holden to pay at the maturity of the loan, if the transaction were upheld, one-quarter more money than had been ever realized and applied to the object contemplated. This was in hostility to the direction that the interest to be paid for this money should not exceed seven per cent. But in the case of *Starin*, the plaintiff purchased the bonds directly from the company, with a knowledge that it had received them in payment for the stock and not upon a loan, and he consequently stood in the place of the company. In the present case I am of opinion that the relator occupies the position of a *bona fide* holder of commercial paper, and is not liable to the defence

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which existed against the railroad company as the first holder of the obligations. The instruments are negotiable upon their face, and they have all the requisites of promissory notes. If a corporate seal would prevent their being held to be negotiable, (which since the case of *The Bank of Rome v. The Village of Rome*, 19 N. Y., 20, cannot be maintained), no defence would arise from that circumstance, for they are simple contracts, and not specialties. The statute does not in terms direct them to be issued in a negotiable form, but it does not forbid it, and as public and corporate securities invariably contain words of negotiability, the supervisors were well warranted in issuing them in that form. The relator, it is true, purchased them at a discount, and if, instead of being payable in twenty years, they had been active mercantile paper, maturing in a few months, that circumstance might have deprived the relator of the character of a *bona fide* holder. But it is not at all an unusual transaction to sell State or municipal bonds, or corporate securities at a price below par. These securities must have been entirely unknown in the money market in New York, and considering that they were payable at so great a length of time, and bound only one of the interior farming towns, it is rather surprising that they brought so large a sum. There is nothing in the circumstance that they were parted with at that price to affect the purchaser with the imputation of bad faith. On this ground I am in favor of holding that the relator is not prejudiced by the fact that the bonds were first negotiated to pay the stock instead of being issued upon a loan.

But the relator is chargeable with knowledge of the terms of the statute, and that the town officers had no authority to act unless the requisite assent of two-thirds of the taxpayers had been obtained. He produced papers purporting to be signed by a great number of persons assuming to be resident taxpayers of Genoa, but did not prove the genuineness of the signatures, nor that the names were on the assessment-roll; but he produced also from the files of the clerk's office the affidavit of the then supervisor and commissioners, annexed to

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the paper containing the signatures, affirming the facts required by the act to be shown, namely, that the several persons whose written assent was thereto attached composed two-thirds of all the resident taxpayers in said town of Genoa on its assessment-roll made and completed next previous to the date of the affidavit. It will be seen that this sworn statement affirms, by a necessary implication, the genuineness of the signatures of the subscribers, and the correspondence of those names with the taxpayers inscribed on the roll, and affirms positively that they constituted the required proportion of all the names on the roll. It would be sufficient to sustain the judgment in this case, if the affidavits were considered *prima facie* evidence of the facts stated in it, for although evidence was given by the defendants tending to contradict these statements, it does not appear that the judge determined the question of fact in favor of the defendants; but inasmuch as he decided that the statute had been complied with, he must be considered as having found the fact against the defendants if such finding was necessary to support the judgment. But it is very clear to my mind that the affidavit was conclusive evidence, in favor of a *bona fide* holder of the obligations, that the requisite number of assents had been obtained. In *The Bank of Rome v. The Village of Rome*, just mentioned, which was an action to recover on bonds issued by the defendants as a municipal corporation, the statute authorizing them had provided that a certain amount of stock in the railroad company, should be subscribed by other parties, before the commissioners of the railroad fund, whom the town was required to elect, should have any authority to issue the bonds, and those commissioners were also required to make a certificate that such subscriptions had been obtained before they could issue the bonds. There was nothing in the act which in terms made the certificate evidence of the performance of the preliminary act. That was left to be inferred, as it is in this case, from the character of the act to be performed, and its apparent bearing upon the authenticity of the obligation to which it related. In both cases the preliminary act was one which it would be impossible for one desirous of lending on the bonds satisfac-

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terily to ascertain. The act therefore devised that method of determining it. The defendants, on the trial of the case on the Rome bonds, offered proof tending to show that valid subscriptions to the required amount had not been obtained, which proof was rejected; and we held that the certificate was conclusive evidence of the fact in favor of *bona fide* holders of the bonds. The case is parallel in principle with the one before us, and ought, I think, to determine the question against the defendants. It has been suggested that the effect claimed for the affidavit was considered and pronounced against, in *Starin v. The Town of Genoa*, above mentioned. I understood the judgment in that case to have been placed upon the ground that the bonds were not issued upon a loan, and that the plaintiff was not a *bona fide* holder of the paper so as to claim a better right than the railroad company had. Some of the judges thought it incumbent on the plaintiff to prove that the requisite number of assenting taxpayers had been obtained. Such indeed was the reasoning of the opinion of Judge LOTT, to which I expressed my dissent, and my impression was that it was concluded to place the judgment wholly upon the position that no money had been borrowed on the bonds, and that the plaintiff was not a *bona fide* holder.* Upon that point all the judges agreed, while upon the other there was a difference of opinion.

Entertaining these views, I must vote for affirming the judgment of the Supreme Court. A number of the judges, however, sufficient to pronounce a judgment, are in favor of reversal on the single ground that it was not shown that two-

* The reporter understood otherwise, as appears by his head note to the *Starin* case. The decision in this case by the same judges is some evidence that he was not mistaken. It is true that no distinct question was taken upon the point,—but the reporter, noting the observations of each judge, as they expressed themselves *seriatim* upon the case, found that a majority concurred then upon the point on which the present adjudication is put. He has thought it advisable to report this case that the point, which was certainly not necessarily involved in the previous judgment, may now be seen to have been authoritatively adjudicated.

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thirds of the resident taxpayers of the town had signed the written assent, and that the affidavit does not supply the defect of proof. The judgment will therefore be reversed, and a new trial be awarded.

DAVIES, J., concurred with DENIO, J., for affirmance. The reporter understood all the other judges to concur with him that mandamus was the proper form of remedy, but they were for reversal for the reason stated.

Judgment reversed, and new trial ordered.

HILL et al. v. CROCKFORD.

The exemplification of the record of a will, in order to be evidence, under ch. 94 of 1850, must contain the proofs taken before the surrogate. A mere exemplification of the will, recorded as having been proved, is insufficient.

APPEAL from a judgment at a general term of the Supreme Court, affirming a judgment of nonsuit given at the circuit. The action was ejectment. The plaintiffs claimed title to the premises sought to be recovered through the will of John G. Hill. To sustain their case, they offered, in evidence, what was claimed to be an exemplified copy of the record, and the whole thereof, of such will, bearing date December 29th, 1803, purporting to be proved before the Surrogate of the City and County of New York, in June, 1805, and recorded in the record of wills in said surrogate's office; but such exemplification did not contain any proofs taken before the surrogate. This exemplification was objected to as evidence on the grounds, 1st. That the proofs taken before the surrogate were not attached: 2d. Because the surrogate of the City and County of New York, on the 1st of June, 1805, had no authority to take proof of said will as a will of real estate. The court sustained the objection, and excluded the evidence.

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Francis Kernan, for the appellants.

Robert H. Tyler, for the respondent.

JAMES, J. It was not claimed on the argument that the surrogate of the City and County of New York had authority to admit a will to probate, and record the same as a will of real property; that power was then vested in the Court of Chancery, the Supreme Court and the Court of Common Pleas. But such surrogate had authority to take the proof of wills, which he was required to record, "*together with the proof thereof*," in books to be kept for that purpose. (Act of March 27, 1801, §§ 3, 7.) In 1850, an act of the legislature of this State provided that "the exemplification of any *record* of any last will and testament, *proved* before the surrogate of any county in the State before the first day of January, 1820, certified under the seal of the officer having such record, shall be received in evidence with the like effect as if the original will had been produced." (Laws of 1850, p. 148.) And it is claimed that the exemplification offered was admissible by virtue of that act. Assuming that the statute of 1850 was designed to make the exemplified copy of the record of any will proved before a surrogate previous to 1820, and recorded according to the law then in force, evidence in all cases the same as if the original will were produced and proved, it would not aid the plaintiff in this case. The paper produced and offered was not an exemplification of any such record as is known to the law. The statute made evidence the exemplification of the "*record* of any last will and testament *proved* before the surrogate," &c. The paper produced and offered in evidence in this case was not any record known to the law. It did not contain any proofs taken before the surrogate. It not only did not contain any proofs, but its assertion that the whole of the record before the surrogate was therein set forth, showed conclusively that there was in fact no record of any proofs. By the terms of the statute of 1801, the proofs were required to be recorded with the will; and hence without such proofs

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the record in the surrogate's court was incomplete and could not be admitted as evidence. Upon this branch this case is very similar to *Morris v. Keyes* (1 Hill, 540). It was there held, although under another statute, but similar in its phraseology, that "*the record included the proofs as well as the will—both were to be recorded together, and the transcript of such record must mean the whole record.*" The record, if complete, would contain the proofs, and the exemplification should in like manner extend to both, otherwise it is inadmissible.

We are of the opinion that the instrument offered as evidence, was not an exemplification of any legal record in the surrogate's court of New York City and County, or of any such record as the statute of 1850 authorized to be exemplified and, when so exemplified, received in evidence.

The nonsuit was properly ordered, and the judgment at the general term should be affirmed.

All the judges concurring,

Judgment affirmed.

94	130
110	154
94	130
126	470

GRIDLEY, Committee, &c., v. GRIDLEY.

A will gave all the testator's real and personal estate, and declared that the donee was to pay all the testator's debts and a certain annuity. The acceptance of the gift creates a personal liability upon which an action can be maintained at law without any express promise.

APPEAL from the Supreme Court. Action brought by the plaintiff as committee of Maria Gridley, a lunatic, to recover certain sums alleged to be due to her. The complaint set forth four distinct and separate causes of action against the defendant. First. That the father of the defendant at his decease, was indebted to Maria Gridley, the lunatic, and that by his will he gave all his real and personal estate to the defendant, and declared therein that "the said George is to pay

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all the debts that I [the testator] may owe at my decease," &c. "And, also, \$85 annually during her life," &c. The complaint further alleged that the defendant "accepted the said several devises and bequests by said will made to him, and then and there took possession of all of the personal estate of the testator whereby he became liable to pay the said indebtedness, and said annuity.

Second. That the defendant was indebted to Maria Gridley for moneys of her received by the defendant.

Thirdly. That said Maria was the owner of certain property which the defendant consented and became liable to pay for, and which he promised to pay for, &c.

Fourth. That the said defendant was indebted to one Sarah Gridley for certain rent, which demand said Sarah Gridley had assigned to said Maria.

The defendant demurred, and assigned for cause that it appeared upon the face of the complaint that several causes of action had been improperly joined.

Judgment was rendered in favor of the defendant at special term and affirmed at general term in the seventh district. The plaintiff appealed to this court.

Theron R. Strong, for the appellant.

J. D. Husband, for the respondent.

DAVIES, J. By section 167 of the Code, the plaintiff may unite in the same complaint several causes of action, whether they be such as have heretofore been denominated legal or equitable, or both, when they all arise out of:

1. The same transaction or transactions connected with the same subject of action.

2. Upon contract, express or implied.

No objection is made to the joinder in the same complaint of the second, third and fourth causes of action, and the propriety of uniting with them the first cause of action depends upon the question whether the defendant was personally liable to pay

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the testator's debt to Maria, and the annuity to her, or whether he could only be charged by a suit in equity therefor. If in the former case, then the law raises an implied promise to pay, and such a cause of action may be united with one founded on an express promise. The only question, therefore, is, whether the defendant, by the mere act of accepting the devise and receiving the personal estate as the devisee and legatee, was charged personally with the debts, so that the remedy against him is on his contract, express or implied. Less emphatic language was held in *Spraker v. Van Alstyne* (18 Wend., 200), to charge the devisee personally with the payment of the testator's debts. By his will in that case, the testator devised a certain lot to his son Martin, and a certain other lot to his son Cornelius, and directed that all his just debts should be paid by his two sons, Martin and Cornelius. In this case the Chancellor, in discussing the question, whether they took a fee in the lands devised, says the rule is that where there is a mere charge upon the estate devised, but not upon the devisee personally, he takes a life estate only, by a general devise of the land without words of limitation to his heirs (as is the devise in the present case), but where the charge is upon the person of the devisee, in respect to the lands devised, he takes a fee by implication. In this case the charge is upon the person in respect to the lands devised, and the meaning of that is, the devisee is directed to pay the debts or legacies personally; so that if the devisee accept the devise, he impliedly assumes to pay the charge. DICKINSON, Senator, says: The testator charged Martin and Cornelius with the payment of all his just debts. The testator gave them the land and charged them with the payment of his debts. This, in the absence of explanation, must be held to be a personal charge. Having accepted the devise, they were charged with the payment of the debts, and had they not paid them voluntarily, they might have been coerced by prosecution." This case was decided upon the theory that the debts were a personal charge upon the devisees, and could have been collected from them, upon their acceptance of the devise, and I am unable to see why it is

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not an authority for holding that, in the present case, a like liability was assumed by the defendant. It is to be observed that the Chancellor says, at page 209, "if they [the devisees] had refused to pay such debts, a Court of Chancery would have compelled them to do so after they had accepted of the devises to them respectively, and if necessary would have ordered the estate in their hands to be sold for that purpose. Whether they could have been sued for those debts in a court of law without an express promise to pay, it is not necessary to decide here." In *McLachlan v. McLachlan* (9 Paige, 584), the devise was of real and personal estate charged with the payment of legacies. The Chancellor held that the legacies were a personal charge upon the devisee in respect to the estate devised. Having accepted of the estate devised—by the receipt of the rent reserved to him, as it became due and payable—he was bound to pay off the legacies charged upon him personally, although they were more than the amount of the rent. In this case the liability was enforced against the property of the devisee, without reference to that received from the testator. It would thus seem to be well settled by authority in this State that the defendant was personally liable to pay the debt due to Maria Gridley and the legacy mentioned.

The next question to be considered is, could such liability be enforced in a court of law, without an express promise to pay the debt and legacy on his part.

Livingston v. Livingston (3 Johns. R., 51), was decided on the ground that the payment of the legacy was not a personal duty upon the devisee, and that of course no duty descended to his personal representatives. This was a case of a devise of land only; and in holding that no personal duty to pay off the legacy devolved on the devisee, it has been overruled by the case of *Spraker v. Van Alstyne* (*supra*). *Becker v. Becker* (7 John., 99), was an action at law, sustained against a devisee of land solely on the ground that a payment of a part of the legacy was any express promise to pay the residue. In the opinion, KENT, Ch. J., discusses the English cases, and comes to the conclusion that there never was any settled course of decision

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against this action, and he holds it can be maintained at law where there is an express promise. He certainly expresses a strong doubt whether the action could be maintained without an express promise, 'but as the decision of that question was not necessary to the disposition of the case, his views on this point cannot be regarded as authority, and the court expressly declines to give any opinion on that point. *Van Orden v. Van Orden* (10 Johns., 30), is a case approaching near the present. There the defendants were the original devisees of real estate only, and, in consideration of the devise, they were expressly charged with the payment of the annuity to the plaintiff. It was an action of assumpsit for the legacy. The defendants took possession of the land devised, and they paid to the plaintiff the first and part of the second annuity. The court considered the acceptance and enjoyment of the estate devised, and the actual payment of part of the annuity, conclusive evidence of an express promise to pay, so as to entitle the plaintiff to recover in that action. It is said (it being well settled that an express promise by the devisee will support the action at law), the court were led to consider whether the payment of the annuity in part was not equivalent to an express promise. The court say: "It is a solemn act and admission, as strong as any promise, and supposes a promise expressly made and to have preceded the payment."

Sole v. Hardy (8 Cow., 333), was decided on the ground that the personal estate was first to be applied to the payment of the debts, and that the devisee of the land was not liable unless the legacy claimed is charged on the estate devised, or on the defendant in respect to the estate.

It will thus, I think, be seen that there is no express authority in this State adverse to the proposition, that where a testator devises all his real and personal estate, and charges the devisee with the payment of his debts and legacies, the devisee, if he accepts the devise and bequest can be sued at law for the recovery of a debt due from the testator, or a legacy given by him, without an express promise on his part to pay. If we consider the nature of the action of assumpsit, we see

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that it is an equitable action, and may be maintained equally on an express or on an implied promise. I understand the law in all cases to imply a promise to pay where it is the duty of one to pay. If I take a newspaper at my house and read it, the law implies a promise to pay for it, because it is my duty so to do. The authorities in this State hold and have settled the law, that if a devisee of land, charged with the payment of legacies, accept the devise, he has the personal duty imposed on him to pay without reference to the fact whether the property devised and accepted is sufficient for that purpose. The liability is created by the acceptance charged with the duty, and no reason is perceived why the duty being clear and personal, the law will not raise an implied promise to discharge it. If this be the rule in a case where the devise is of land merely, how much stronger is it in a case where the whole estate of the testator is given, both real and personal, and the devisee is personally charged with the payment of debts and legacies. If he elects not to assume the liability, which the testator has imposed, he is bound to refuse acceptance. If he accept he takes *cum onere*, and he cannot take the ground that he is only liable to the amount of assets, or that the estate is to be duly administered, and debts and legacies are to be paid *pro rata*. The only reason for sending the party, to whom a debt or legacy is due, into a court of equity, is to obtain a due administration of the estate, and payment of the debts equally, and the legacies in the same proportion. But when the devisee is personally charged with the payment of the debts and legacies, and takes the whole fund out of which they are to be paid, and his taking is on condition that he pay all the debts and legacies, if he accepts, his liability is absolute. The law raises an implied promise on his part to pay, and no reason exists for sending a creditor or legatee into a court of equity to enforce such liability. If any such reason might have been supposed to exist before the adoption of the Code of Procedure, it is believed that we should not any longer adhere to distinctions which are antiquated, and which substantial justice does not require to be retained. The object of the Code, and

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the intent of the legislature in passing it, were to simplify and expedite the administration of justice, and when a party has demands of a legal and equitable nature against the same person, they may be enforced in one action, if consistent with the rules prescribed. This provision is remedial and beneficial, and should receive a liberal construction. (*Emery v. Pease*, 20 N. Y., 64; *Cole v. Reynolds*, 18 id., 76; *Phillips v. Gorham*, 17 id., 270.)

The precise point, now under consideration, has been considered and passed upon by the Supreme Court of Connecticut, and I yield my assent to the arguments and authorities there relied upon. *Lord v. Lord* (22 Conn., 602), was an action to recover a legacy. The words of the will were: "I will, order and direct that my nephew, William M. Lord, pay Sarah L. Marshall," &c.; and the court held it created a personal charge on him to pay the legacy, and although he was named executor of the will (as the present defendant is), that he should not charge the payment of it against the estate in his hands, as executor. The court also held it to be a private personal duty, founded on his election to accept and enjoy under the will a large and ample bequest of personal and real estate. *Olmstead v. Burch* (27 Conn., 530), is conceded to be a case in point, and if sustained here, disposes of this case. There the testator gave to his son, Joseph, the whole of his real estate, and directed that he should pay the legacies named in the will. He also appointed him sole executor. The court held that he was not to pay the legacies as executor, but as devisee; the payment of the legacy constituting a condition of the devise, the acceptance of which implied an assent to the condition, and a promise to pay the legacy, and for a breach of which promise, Joseph was liable in assumpsit. ELLSWORTH, J., in an able and well-considered opinion, shows satisfactorily that the defendant is liable in an action of assumpsit on his implied promise. He says: "We find in the books a class of conveyances, leases, &c., by deeds poll, in which some clause is inserted by the grantor imposing a duty of some kind on the grantee, which, if accepted, is held to create an implied obligation that the grantee is to com-

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ply with the condition. Not that the grantee covenants to do it, for the words are the words of the grantor; but if the grantee accepts the deed, he assents to the condition in it, and becomes liable on an implied assumpsit to keep and perform it." He cites *Platt on Covenants*, pp. 10, 18; *Trustees of Hocking & Company v. Spencer*, 7 Ohio, 498; *Goodwin v. Gilbert*, 9 Mass., 510; *Burnett v. Lynch*, 5 Barn. & Cress., 589; *Parish v. Whitney*, 3 Gray, 516. *Goodwin v. Gilbert*, was an action of assumpsit, where land was conveyed by a deed poll, and the grantee enters under the deed, certain duties being reserved to be performed by the grantee. The court held, that as no action lies against the grantee on the deed, the grantor may maintain assumpsit for the non-performance of the duties reserved, and the promise being raised by the law, is not within the statute of frauds.

Burnett v. Lynch was an action against Lynch, as assignee of a lease for the damages which the plaintiffs had sustained by reason of his breach of the covenants of the lease. The lease was assigned to him and, by the terms of that assignment, he was to hold subject not only to the payment of rent, but to the performance of the covenants. Chief Justice ABBOTT says: "It is true that Lynch entered into no express covenant or contract, that he would pay the rent and perform the covenants. But he accepted the assignment subject to the performance of the covenants." He says: "Will an action of assumpsit lie? I think it would, and for the reason that the defendant has by taking the estate subject to the payment of rent, and the performance of the covenants in the original lease, thereby made it his duty to pay the rent and perform the covenants. If by his neglecting that duty a burden is cast upon the person from whom he took the estate, it seems to me that the law will imply a promise as arising out of that duty, and in that case assumpsit will lie. In *Parish v. Whitney*, the court say: "The question is, whether the clause in the deed of Putnam to Tinker creates an incumbrance upon the land. It is quite clear it is not a reservation out of the estate granted. It is not a condition upon which the estate is to be

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plaintiffs by Kerr & Co. at the time of the purchase, of the existence of the \$15,000 chattel mortgage on their property.

At the close of the plaintiffs' case the defendant moved to dismiss the complaint on the ground: 1. That the plaintiffs had not proved that any false representations or means were used by Kerr & Co. to induce the plaintiffs to sell them the goods in suit: that the mere insolvency of Kerr & Co., though well known to them at the time, would not avoid the sale or enable the plaintiffs to maintain this action. 2. That there was no relation of special trust or confidence between the plaintiffs and Kerr & Co., which imposed upon the latter the legal obligation to disclose their pecuniary circumstances to the plaintiffs, or which made their purchase fraudulent in consequence of their omission to do so. The court denied the motion, and the defendant excepted.

In submitting the cause to the jury, the court, among other things, said: "If you are satisfied that Kerr & Adams purchased the goods with an intent not to pay for them and to defraud, the plaintiffs must have a verdict," to which the defendant duly excepted. The plaintiffs had a verdict for the value of the goods, and the defendant appealed.

P. T. Woodbury, for the appellant.

John H. Reynolds, for the respondents.

JAMES, J. If the judge was correct in his refusal to dismiss the complaint when requested, he was surely right in his charge to the jury. The whole case turns upon the question whether there was evidence sufficient to be submitted to the jury upon the question of fraudulent intent. It was settled by this court in the case of *Nichols v. Pinner* (18 N.Y., 800, and 23 N. Y., 264), that the mere omission of a purchaser of goods for credit to disclose his insolvency to the vendee was not such a fraud as would avoid the sale: that when no inquiries are made and the vendee makes no false statements, nor resorts to any artifice to mislead the vendor, he may remain silent as to

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his pecuniary condition without being guilty of fraud. In this view of the case, Kerr & Co. were not proven guilty of any fraudulent act.

It is, however, equally well settled that if a vendee obtain goods upon credit with a preconceived design not to pay for them, such act is fraudulent, and the defrauded party may, on discovering the fraud, repudiate the sale and reclaim the property. In fact, any dishonest intention executed, which produces injury or loss to another, is a fraud.

To establish this fraudulent intent, the plaintiffs proved the insolvency of the vendees at the time of their purchase of the goods in suit: their failure and assignment ten days afterwards: their full knowledge of their insolvency for a long time before their failure: that they were only kept from stopping payment by the daily aid of the defendant; that the assignors on the same day that they purchased from the plaintiffs, also purchased on a credit of four months two other bills of goods, amounting to over \$2,000: and that there was a chattel mortgage on their goods to the defendant, which enabled him to close their business at any moment he saw fit. No explanation of these facts was offered by the defendant.

I accede to the proposition of the counsel for the defendant, that fraud must be proved. It can never be presumed, in the absence of all evidence on the subject. Nevertheless, the motive with which an act is done may be, and often is, ascertained and determined by inferences drawn from the proof of facts and circumstances connected with the transaction and the parties to it. KENT says: "a deduction of fraud may be made not only from deceptive assertions and false representations, but from facts, incidents and circumstances: such even as may be trivial in themselves, but in a given case, often decisive of a fraudulent design." In cases where there is no overt act of fraud, it is often very difficult to prove a dishonest purpose. In all such cases, instead of proving false representations or other fraudulent practices, resort is had to various incidents and circumstances which are calculated to exhibit the hidden purposes of the actor's mind.

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So in this case: Kerr & Adams were not guilty of any overt act of fraud in the purchase of the goods sought to be recovered: nor did they make any representations one way or the other as to their pecuniary condition, and hence proof was made of their pecuniary situation, the facts and circumstances connected therewith, and their acts and conduct in relation to their other purchases, and as to this purchase, in order to determine the motive and intent with which it was made. This proof shows Kerr & Adams, at the date of the purchase, badly insolvent: that such fact was well known to themselves: that there was a chattel mortgage of \$15,000 on their stock of goods to the defendant, whereby their business could have been closed at any moment: that they had been helped by the defendant, the preferred creditor in the assignment, from day to day, for some time past, to keep them from failure: that they purchased of several persons large bills of goods, the plaintiffs among the rest, just on the eve of suspension: and their final suspension and assignment, transferring the goods thus bought, to the assignee. These facts, in the absence of any explanatory proof, were sufficient to carry the case to the jury and fully justified the court in its refusal to dismiss the complaint.

The charge of the court was entirely unexceptionable. The evidence being sufficient to carry the case to the jury, it was proper to instruct them that if they were satisfied the goods were purchased without any intent to pay for them, but with an intent to defraud the plaintiffs, their verdict should be for the plaintiffs.

All the judges concurring,

Judgment affirmed.

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137 63*APPLEBY v. BROWN et al., Administrators, &c.*

The action of account, at common law, would only lie between two merchants. It was unavailable where the partnership consisted of a larger number.

The Revised Statutes (2 R. S., p. 385, § 49), though implying a different understanding on the part of the legislature, did not change the law or enlarge the cases in which the action might be brought.

APPEAL from the Supreme Court. In the spring of 1845, the plaintiff, and one White, and the defendants' testator, Van Winkle, entered into a partnership in the city of Buffalo. The terms of the co-partnership were that the plaintiff was to furnish all the goods the other two members of the firm could sell at Buffalo. White and Van Winkle were to have the active charge of the business of the firm, and to render their services in its management; and, in consideration thereof, they were to receive one-half of the profits of the business, to be equally divided between them, and the plaintiff was to receive the other half of the profits. The losses of the business were to be borne in the same proportion. The business was continued till October, 1846, when, the firm being unsuccessful, the plaintiff settled up its business and affairs, and it was dissolved. The plaintiff called on White to contribute his share of the losses and pay the same to him, which he did by giving his notes for the amount, and the plaintiff discharged him from any further claim.

Van Winkle remained in this state until February 11th, 1848, when he went to New Orleans, where he remained until his death, on the 17th May, 1849. On the 25th August, 1856, the will of Van Winkle was proven, in this state, before the surrogate of the county of Wayne, and the defendants were appointed administrators with the will annexed. This action was commenced on the 14th of August, 1857. The question presented for consideration was whether the plain-

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tiff's claim was barred by the statute of limitations. The referee who tried the cause held, it was not, and gave judgment for the plaintiff for the amount due to him. This judgment was reversed, at the general term, and a new trial ordered. The plaintiff appealed to this court.

C. D. Lawton, for the appellant.

William Clark, for the respondent.

DAVIES, J. The right of action had accrued before the adoption of the Code of Procedure, and the statutes in force at the time it accrued (in October, 1846) are applicable and must govern in the disposition of this case (§ 78 of the Code). We must, therefore, recur to the provisions of law existing at that time. The plaintiff, seeking to enforce his rights, must have resorted either to an action at law or to a suit in equity. If the former, then the appropriate and only action, which could have been invoked, was that of account, as known and recognized at common law. Upon the assumption that the appropriate action was the common-law action of account, then, by section 18, subdivision 4, of article 2, part 3, chapter 4, of the Revised Statutes, the action was required to be commenced within six years next after the cause of action accrued; and if the plaintiff's only remedy was by a bill in equity, then, by section 52, of article 8th, same part and chapter, the bill must be filed within ten years after the cause of action accrued, and not after. And by section 49, it is provided, that whenever there is a concurrent jurisdiction in the courts of common law, and in the courts of equity, in any cause of action, the time limited for the commencement of suit for such cause of action in a court of common law shall apply to all suits thereafter to be brought for the same cause of action in a court of equity. The question, therefore, presented is, whether at the time the cause of action accrued in this case, there was a concurrent remedy, in the courts of common law and in the courts of equity; and

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the solution depends upon the question whether the plaintiff, in the present case, could have maintained in the courts of common law against the defendant, Van Winkle, the ancient common-law action of account.

It is said, of this action, that it is one of antiquity, and lies at common law against guardians, bailiffs, receivers and mercantile co-partners, to compel an account of profits or moneys received. It was an action, provided by law, in favor of merchants, and for advancement of trade and traffic, as when two joint merchants occupy their stock of goods and merchandise in common, to their common profit, one of them, naming himself a merchant, shall have an account against the other, naming him a merchant, and shall charge him as *receptor denariorum*. (Co. Litt., 172, a.) [The learned judge here cited the observations of Blackstone (3 Com., 162, 163) upon the history and inconveniences of the action of account, and those of BRONSON and COWEN, Jr., in *McMurray v. Rawson* (3 Hill, 59), upon the difficulties attending the action even after the modification of the practice therein by the Revised Statutes. He proceeded:]

I think, therefore, if the courts of common law had concurrent jurisdiction of the subject-matter of the cause of this action with the courts of equity, such jurisdiction was ineffectual to confer any substantial right upon the plaintiff. He would have found it difficult, with this case in his way, to have obtained a hearing in a court of law in an action of account. I cannot be mistaken in supposing that he would have had a speedy exit, and been dispatched to a court of equity. But I think it is well settled upon authority, that this action of account given by the common law, could only be maintained between *two* merchants, and when the firm consisted of more, this strict action could not be sustained. Coke, already quoted, confines the action to the case of two joint mercantile partners in which case one may charge the other. In *Beach v. Hotchkiss* (2 Conn. R., 425), it was holden not to lie where there are more than two partners, and Judge COWEN, says in *McMurray v. Rawson* (*supra*): "That with us, where the Court

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of Chancery is open to a much better remedy, there is no reason for giving Coke's words a liberal construction. Judge COWEN, further adds: that he desires not to be understood as conceding that this action will lie at all either between partners, who are not merchants or joint tenants, or tenants in common of personal property, as such. On the contrary, when it goes on partnership, he says: "I apprehend the plaintiff must aver both himself and the defendant were partners as merchants, in such terms as to show that the case is within the law of merchants. I admit the action may then be sustained against the defendants as receivers, where the firm consisted of two persons only." I think this a just and correct exposition of the law on the subject, and that an action of account, the strict common-law action, could not have been maintained by the present plaintiff, the firm consisting of more than two persons. The reasons for not favoring the action or giving a more liberal construction to the rules applicable to it, have already been adverted to and need not be repeated.

We think the legislature of our own State, have not enlarged the cases in which, at common law, the action could be maintained. The first act passed is that of Feb. 6, 1788. (Greenl. Laws, vol. 2, p. 4.) This act was republished in the revision of 1813, in the same words. (Laws of 1813, vol. 1, p. 90.) In the revision of 1880, under the title of "consolidating and referring causes" (2 R. S., pp. 383, 384), the revisers endeavored to simplify the proceedings in an action of account, by substituting referees for auditors, and conferring on the former, the powers given to the latter by the act of 1788. We do not think the language used in section 49 (p. 385), was intended to change the rules of the common law or to enlarge the cases in which the action might be brought.

I come, therefore, to the conclusion that the common-law action of account could not, at the time the cause of action in this case accrued, have been maintained against the defendant Van Winkle; or assuming that by the provisions of the Revised Statutes, the action is given in all cases against executors and administrators in which it could be maintained against

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their testators or intestates, it could not have been maintained against Van Winkle's administrator, for the reason that it could not have been prosecuted against him.

At the time the present cause of action accrued, the plaintiff had the sole remedy of an action in a court of equity, and a court of law had no concurrent jurisdiction. As he had ten years from the time his cause of action accrued, that time was further extended for the period of eighteen months, by the provisions of section 8, title 3, article I, chapter 8 of 8d part of the Revised Statutes, which declares, that the term of eighteen months after the death of any testator or intestate shall not be deemed any part of the time limited by law for the commencement of actions against his executors or administrators. The statute did not therefore run, or in other words was suspended, for the period of eighteen months next immediately after the death of the testator or intestate, and as this suit was commenced within eleven years from the time the cause of action accrued, the statute of limitations presents no obstacle to the plaintiff's right to recover. As this is the only point discussed on the argument, and one which disposes of the case, it follows that the order of the general term granting a new trial should be reversed, with costs, and the judgment of the special term should be affirmed.

COMSTOCK, Ch. J., and DENIO, J., concurred on the ground that the action of account would lie at common law only between two partners, and that the Revised Statutes although assuming that it would lie where there were more than two partners had not so enacted. LOTT and MASON, Js., also concurred.

JAMES, J. (Dissenting.) The plaintiff insists that his action is of exclusive equity jurisdiction and is entitled to the benefit of the ten years statute. If this be so, then, deducting the periods of suspension, the right of action was not barred.

The statute provides (2 R. S., p. 301, § 52) that actions not cognizable in courts of law shall be commenced within ten

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years after the cause of action shall accrue, and not after." But section 49, same title, further provides that "whenever there is a concurrent jurisdiction in the courts of common law and in courts of equity of any cause of action, the provisions of this title, limiting a time for the commencement of a suit for such cause of action in a court of common law, shall apply to all suits hereafter brought for the same cause in Court of Chancery;" qualified by section 50, that its provisions shall not extend to suits over the subject matter of which a court of equity had peculiar and exclusive jurisdiction, and which subject matter was not cognizable in the courts of common law.

It is insisted, however, that the plaintiff could have maintained an action of account at law at any time after the dissolution of the co-partnership, and hence the case was not one of exclusively equity jurisdiction.

I think it may be regarded as settled that an action of account could be maintained in this State, by one partner against another, before the adoption of the Code. (*Duncan v. Lyon*, 3 Johns. Ch., 351; *Atwater v. Fowler*, 1 Edw., 417; *Ogden v. Astor*, 4 Sand., 324); and in this State such action was not limited to mercantile partners, as at common law, but lay between partners in any business. (*Kelly v. Kelly*, 3 Barb., 419; *Fowle v. Kirkland*, 18 Pick., 299; 2 R. S., p. 885, § 49.) And it also lay by one or more partners against one or more partners. (2 R. S., p. 885, § 49.)

This action as between mercantile partners existed at common law. (Co. Litt., 172, a; Co. Jac., 410.) Coke says, "if two joint merchants occupy their goods and merchandises in common to their common profit, one of them, naming himself a merchant, shall have an account against the other," &c. This language, COWEN, J., held, in *McMurray v. Rawson* (3 Hill, 65), should be literally followed, restricting the action to cases where there were but two partners, and holding it would not lie when there were more than two; citing *Beach v. Hotchkiss* (2 Conn., 480). Although this position was denied by DUNCAN, J., in *Whelen v. Watmough* (15 Serg. & Rawle,

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153.) I do not propose to discuss the point because I consider the question disposed of, in this state, by our statutes. Their language is, "when any action of account shall be brought by one or more partners against another partner," &c. (2 R. S., p. 885, § 49), showing clearly that the legislature contemplated that actions of account might be maintained when there were more than two partners.

The action of account being a part of the common law of England at the adoption of the Constitution of this State, in 1777, became, by that instrument, a part of the law of this State. In 1788, the legislature passed a statute entitled "An act for giving further remedy by action of account," somewhat defining and prescribing the practice therein, and in the revision of our statutes, in 1830, the legislature assumed that the action of account would lie; for they provide for a mode proceeding after judgment rendered that the partner account, or that the defendant account to the plaintiff, which renders the whole subsequent proceeding plain and simple to every one disposed to learn and understand the practice. (8 Bosw., 423.)

An action of account is also given by the Revised Statutes (2 R. S., p. 113, § 2) against executors in all cases in which the same may have been maintained by their respective testators; and administrators are made liable in the same manner as executors. (2 R. S., p. 113, § 3.)

It follows from these views that an action of account at law might have been maintained by the plaintiff against the intestate in his lifetime, and against the administrator since his death, for the claim sought to be enforced by this action. That being so, the period of limitation was six years; and that time having elapsed, after the right of action accrued, before the commencement of this suit, the claim was barred.

The judgment of the general term should be affirmed.

HOYT, J., was also for affirmance. SELDEN, J., did not hear the argument.

Judgment reversed, and judgment for plaintiff.

The Poughkeepsie and Salt Point Plankroad Company v. Griffin.

THE POUGHKEEPSIE AND SALT POINT PLANKROAD
COMPANY v. GRIFFIN.

Under the general plankroad act (ch. 210 of 1847), those only who subscribe the articles of association are entitled to stock or compellable to pay for the same.

The preliminary subscription and other steps prior to the signing of the articles of association are provisional and inchoate, creating no fixed right and imposing no obligation on the parties.

It seems that one otherwise liable as a corporator would not be discharged by reason of the legislature's having extended the time for laying plank and permitting the corporation, in the meantime, to act and collect tolls as a turnpike company. *Per DENIO, J.*

APPEAL from the Supreme Court, where the plaintiffs sued the defendant to recover \$500, for which it was claimed he was liable as a subscriber to the capital stock of the plaintiffs' company. The plaintiff gave in evidence an agreement, dated March 8, 1853, purporting to have been signed by the defendant and others, by which the subscribers agreed to take and pay for the number of shares of stock, at fifty dollars a share, set opposite their names, to the directors of a company thereafter to be formed,—under the general act of May 7, 1847, authorizing the formation of plankroad and turnpike corporations,—for the purpose of constructing a plankroad from the village of Poughkeepsie to Salt Point, in the town of Pleasant Valley, in Dutchess county, payable at such time and place as the directors might direct. The paper mentioned the total amount of the capital stock required, and the number of shares. The number of ten shares was affixed to the defendant's name. The heading of the paper was in these words: "The Poughkeepsie and Salt Point Plankroad, with the privilege of extending the same to Clinton Corners." The plaintiff gave in evidence its articles of association, which bore date March 22, 1853, and were signed by a number of persons, not including, however, the defendant. Other documents,

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and oral evidence, were produced to show that the plaintiff was duly incorporated under the act, but no question was made upon that point. The subscription was not in the defendant's handwriting, but his name was written by one Cornell, in his presence, and by his direction, as it was alleged. A question was made upon the execution of the instrument; the defendant insisting that he authorized his name to be signed only on condition that the road should be located on a certain route, and that it was laid out on another route. But the judge, before whom the case was tried without a jury, found that the defendant did subscribe for ten shares of stock.

At the close of the evidence a number of objections were taken to the plaintiff's right to recover, but they were, for the most part, determined by the judge's finding upon the question of fact.

One, however, arose, out of an act of the legislature of 1854, which was admitted to have been passed on the application of the plaintiff. That act is in the following words: "Section 1. Whenever the Poughkeepsie and Salt Point Plankroad Company shall construct and grade their road, or any part thereof, in accordance with the statute in relation to turnpike companies, and shall obtain the certificate of a majority of the inspectors of turnpikes of the county of Dutchess to that effect, then said company may erect tollgates upon their road, and receive the same tolls as allowed by law to turnpike companies. Section 2. The said company, until they plank their road shall be subject, in all respects, to the provisions and regulations relative to turnpike companies, in chapter 210 of 1847, and in other laws amendatory and supplementary thereto, and shall be invested with all privileges and rights given by said acts to turnpike companies. Section 3. The said company shall have five years further time to complete their road than now allowed by law."

It was admitted that the road had not been planked; but turnpike gates had been erected pursuant to the act. The defendant's point was that he was discharged from his subscription by the passage of the act, because, as he insisted, it

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changed the nature of the corporation and of the contract between the parties. The judge refused to hold that this was a defence, and the defendant's counsel excepted. The report was in favor of the plaintiff for the amount of the subscription, with interest, and the defendant appealed.

John K. Porter, for the appellant.

Amasa J. Parker, for the respondent.

DENIO, J. The question which naturally presents itself in the outset of this controversy is, whether the defendant has so far committed himself by signing the undertaking set out in the case, as to be unable to retract; or whether, as is insisted in his behalf, it was necessary for him to subscribe the articles of association in order to bind himself to the payment of his subscription. This depends upon an examination of the general act to provide for the incorporation of plankroad companies and of turnpike road companies. (Laws of 1847, ch. 210.) It declares in the first place that any number of persons, not less than five, may form themselves into a corporation by complying with the requirements afterwards specified. It then provides that a certain notice shall be published pointing out where books for subscribing to the stock shall be opened, and then proceeds thus: "And when stock to at least the amount of five hundred dollars for every mile of the road so intended to be built shall be, in good faith, subscribed, and five per cent paid thereon, as hereinafter required, then the said subscribers may, upon due and proper notice, elect directors for the said company; and thereupon they shall severally subscribe articles of association, in which shall be set forth the name of the company," &c. [naming certain other particulars to be contained in it.] "Each subscriber to such articles of association shall subscribe thereto his name and place of residence, and the number of shares taken by him in said company." It then provides for the filing of the articles in the office of the secretary of state, and proceeds: "And thereupon the persons who

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have so subscribed, and all persons who shall, from time to time, become stockholders in such company, shall be a body corporate," &c. The paper which the defendant signed did not contain the matters required to be set forth in the articles, but was in its character preliminary to the articles. But the defendant never went any further. He did not, so far as it appears, participate in the choice of directors, and his name was not subscribed to the articles of association. The result of the best reflection which I can give to the matter is, that no legal significance is predicable of the signing of the preliminary paper. The theory seems to me to be this: The parties designing to form a company are to ascertain in the first instance who will unite with them in the enterprise. It was proper that the public generally should have an opportunity to join, to prevent the secret or clandestine formation of a company to control a public thoroughfare. Hence the requirement that notice should be given by advertisement of the opening of books of subscription. The persons desirous of taking part in the enterprise were, it is to be inferred, to subscribe in the books so to be opened, and to make the preliminary payment. When this process was gone through with, and the books were examined, it would be seen who the individuals were who had thus signified an intention of becoming interested in the project. The persons thus ascertained as the undertakers of the enterprise, are thus (after due notice, so that nothing shall be done behind the back of any one,) to do two things: elect directors and sign articles of association. These were to be, I think, simultaneous and concurrent acts. The preliminary subscribers are to elect directors, but the articles are to state how many directors there shall be, and to mention the names of those first chosen. It is clear that the election of directors cannot take place until the terms of the articles shall be agreed on; and the authors of the articles and the constituents who designate the directors, are the same persons. As neither of the acts can be fully completed until the other is consummated, it follows that neither can precede the other, but that they must be done concurrently. Now

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suppose one of those who, by signing the preliminary subscription, has agreed to become a corporator refuses to go any further. The others, who chose to adhere, if enough are left, can doubtless go on and complete the organization by electing directors and signing the articles; but can they hold the one liable who has changed his mind? The statute declares that the subscribers to the stock shall severally subscribe the articles of association; and, further on, that "those who have so subscribed, and all persons who shall from time to time become stockholders in such company, shall thereupon be a body corporate." The other persons, besides those who have so subscribed (that is who subscribed before the filing of the articles) are such as shall subsequently take stock, or who shall become shareholders by transfer from other shareholders. There is an invincible implication that only those who sign the articles, and such others as subsequently acquire a right to stock shall be members of the corporation. I do not see how it is possible that one who has stopped short, before signing the articles, can be a corporator, or be entitled to any stock; and if he is not entitled to stock, he certainly ought not to be compelled to pay for any. It may very well happen that the amount subscribed for one of these roads will greatly exceed the amount required, or which can be used in constructing the road. No method is pointed out by the statute for distributing the stock, and yet in such a case the project would fail unless some method could be fallen upon to designate those who should be stockholders, and the number of shares which each should have. Suppose this should be accomplished by lot or by mutual agreement, no one would contend that those who were left out would be obliged to pay their primary subscription, or that those who were taken in for a less amount than that which they had subscribed, would be obliged to pay for the shares they could not have at the time of signing the preliminary subscription, supposing that to be a different thing from the subscription to the articles, there would be no shares, and no designated amount of capital stock; and no one could say what amount of money each separate share would repre-

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sent; for these are matters to be afterwards ascertained, and to be specified in the articles of association, and cannot in the nature of things have any existence until the articles are signed. Yet the defendant in this case is called upon to pay five hundred dollars, as the price of ten shares of the stock. If it was the preliminary subscription which was to constitute the obligatory instrument, there would be no necessity of repeating the undertaking in the articles; yet the subscribers to the articles are required to state the number of shares taken by them respectively. Without indulging in any further criticism upon the language of the act, I conclude that the system established by it does not contemplate any binding obligation until the parties who intend to be shareholders come together and designate the directors,—who, as their agents, are to manage the concern,—and at the same time agree upon the amount of the capital stock, and the other particulars required to be stated in the articles. Having thus established the elements which go to make up their respective rights and liabilities, they give effect to the arrangement by signing the articles in which these elements are stated; and then, and not before, a personal obligation is created against each subscriber to pay for the shares which he has taken. The steps which are required to precede this are provisional and inchoate. Their only object is to bring these persons together who are ultimately to form the corporation, in order to effect an organization and execute the contracts for taking and paying for the stock. Any one who withdraws here, or is allowed to drop out of the enterprise before this first binding transaction takes place, has failed to become a shareholder and has no interest in or liability for any stock which has been or shall be created.

There is a great similarity between the plankroad act, and the general act for the incorporation of railroad corporations, passed in the year 1848 (ch. 140). So far as the present question is concerned I think the provisions are identical. In *The Troy, &c., Railroad Company v. Tibbets* (18 Barb., 297), the Supreme Court sitting in the third district held, after great consideration, that the preliminary subscription under that act

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did not entitle the subscriber to stock or bind him to the payment of the price. It was looked upon substantially in the light in which I have considered it, as preliminary and inchoate and of no legal significance except to bring the parties who were to act together in the formation of the company in correspondence with each other, so that they might choose directors and agree upon the constitution of the corporation. The same doctrine was reiterated in *the same plaintiff v. Warren*. (Id., p. 810.)

If I knew that my brethren would concur with me in these views, I should not be obliged to express any opinion upon the other questions which the case presents.

The substance of the act of 1854, is that this corporation, which had then been formed, should have five years' time to complete its road beyond that allowed by the existing law, and that until it should be completed by the laying down of plank, it might erect gates and collect tolls according to the rates prescribed in respect to turnpike companies, whenever they should procure the road to be graded and should have it inspected by the inspectors of turnpike roads. In the meantime they were to enjoy the legal rights and privileges of turnpike companies, and to be subject to the legal requirements respecting them. It is certainly possible that this act was obtained simply as a cover for abandoning the plan of a plankroad, and to enable the directors to establish a turnpike. This, however is not the presumption of law. On the face of the enactment it simply conferred on the corporation an indulgence which it would not otherwise possess, of postponing the completion of the road for a considerable time, and of so managing it that it should be a source of profit in the meantime. I think this was within the scope of the reservation contained in the general act which declares that the legislature may, at any time alter, amend or repeal it, and may amend and repeal any corporation which may be formed under it. A much more material alteration was made in the general banking law, which was held by this court to be within the scope of the reservation contained in that act. (*Matter of Oliver, Lee & Co's Bank*, 21 N.

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Y., 9, and see also the cases therein referred to.) The doctrine of that case is that the usual reservation contained in the general acts for the formation of corporations, authorizes changes in the legal prescriptions bearing upon corporations which had been created under them, to the same extent as though such corporations had been established by a special legislative charter containing in itself a similar reservation. Under this rule there can be no doubt but that the act of 1854, was a legitimate exercise of the power reserved in the plank-road act. It consequently discharged no obligation that the defendant was under to pay the stock in the plaintiff's company. Being of the opinion, however, before expressed that he had made no valid contract to take and pay for the stock, I think the judgment of the Supreme Court charging him with the price should be reversed.

All the judges (except SELDEN, J., who was absent), concurring,

Judgment reversed and new trial ordered.

BONATI v. WELSCH, Executor, &c., of BONATI, deceased, and others.

The rights of a wife, as creditor of her husband under the law of France, where the marriage was contracted, continue and attach to the property of the husband where he abandons her and dies domiciled in this State. Accordingly, where the husband had appropriated the proceeds of real estate inherited by the wife during coverture, and she was, by the French law entitled to priority of payment out of his estate, held, that such right to priority exists as against his legatees, though the property bequeathed had all been acquired by him in this state subsequent to his desertion of the wife.

APPEAL from the Supreme Court. Action by a widow residing in France, against the executors and legatees of her deceased husband, to recover the value of certain real estate

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inherited by her, which was sold with her assent and the proceeds received by her husband while she was living and domiciled with him in France. Upon the trial these facts were proved and found:

On the 28d day of January, 1828, the plaintiff married at Severne, in France, Maximilian Bonati, and continued his wife until he died in 1849.

The plaintiff was born in France, and the husband in Germany, and both were domiciled and resided in France at the time of the marriage. They had issue of that marriage, the defendants, Antoine and Marie A. Bonati, both of whom were born in France while their parents were residing there. The plaintiff and Bonati continued to live together in France in the relation of husband and wife until Bonati quitted France in 1837, and came to the city of New York, leaving the plaintiff and the two children in France, where they have since resided. He (Bonati) became a naturalized citizen of the United States, and continued in this state until his decease. There was no special contract of marriage between them, and none except that created by the laws of France.

In 1830, the plaintiff, on the death of her mother, became owner, by title of succession, of certain real estate (or immovable) in France, which was sold by mutual consent of the plaintiff and her husband; and the money arising from the sale, amounting to nineteen thousand two hundred and fifty-four francs, was paid to and retained by him. No part had ever been paid to her, nor had she ever been in any way compensated for it; except to the extent of nine hundred and eighteen francs.

Bonati never returned to France, and at his death was worth several thousand dollars.

He left a will, of which the defendant Welsh was executor, by which he bequeathed a legacy of four hundred dollars to each of his said two children, and gave the residue of his property to the executor in trust for two illegitimate children and their mothers. All the testator's debts had been paid, and considerable property remained in the hands of the executor.

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No provision is made in the will to recompense the plaintiff for the price of the real estate sold as before mentioned.

By the French law, Bonati was entitled to receive the price of said real estate when it was sold and to retain it, and enjoy the income during the existence of the community. At the dissolution of the community, which took place at his (Bonati's) decease, the plaintiff was entitled to take from the property of the community, the amount for which said real estate had been sold, and in case of insufficiency of that property, she was entitled to claim and receive the deficiency from the property of her late husband; and her claim against the property of the community took precedence of any claim of the husband's representatives; and as to the property left by him, she was entitled to payment before his creditors.

Bonati left no property, either of the community or otherwise, in France at the time he left that country.

The sections of the Code Napoleon, on which the above finding of the French law is based, are referred to in the opinion of DAVIES, J.

The Civil Code of France was given in evidence on the trial, and all the provisions thereof, applicable to or affecting this case, were read on such trial, and the laws of France therein contained, constitute a portion of the facts upon which the case was heard.

At the trial a judgment was entered, granting the prayer of the complaint and ordering repayment by the executor of the amount received by Bonati on the sale of his wife's real estate, with interest from the time of his death. This judgment was affirmed on appeal at general term, in the first district, and the defendants appealed to this court.

Charles P. Kirkland, for the appellants.

John W. Edmonds, for the respondent.

DAVIES, J. By section 1387 of the Code Napoleon, the law in reference to the conjugal relation is prescribed in de-

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fault of special agreement; and by section 1398, in default of special stipulations, the law of community prevails. By sections 1401 and 1402, the community consists of such movable property as fall to either party during the marriage by any title whatever, and all immovables acquired during marriage. By section 1404, the immovables which fall to them during marriage by title of succession do not enter into the community. Section 1483 provides that if an immovable belonging to one party be sold and the price paid into the community, there is ground for the deduction of the price so paid in from the community for the benefit of the party who was proprietor of the immovable sold. Section 1486 declares that recompense for the price of an immovable belonging to the wife is claimable by her out of the property of the husband, in case of the insufficiency of the goods of the community. By section 1470, on the dissolution of the community, from the mass, each one deducts the price of immovables which have been alienated during the community, and for which compensation has not been made. By section 1471, the shares of the wife take precedence of the husband, and by section 1472 the wife is entitled, in case of insufficiency in the community, to exercise her claims out of the property of the husband. Section 1441 declares that the death of either of the parties works a dissolution of the community, and by section 1458 after the dissolution, the wife has the power to accept or renounce it. By section 1498, the wife who renounces has a right to receive the price of the immovables alienated, for which compensation has not been made to her. And by section 1495, she may exercise all actions and previous demands as well against the goods of the community as against the personal goods of her husband.

From this examination of the French law it follows that the property of this plaintiff which came to her during marriage, by succession from her mother, being immovable, still belongs to her: that she could alienate it, as she did, with her husband's consent: that he had the management of it,

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and had a right to retain the avails of the sale, and keep them during the existence of the community, and had a right to the enjoyment of its emoluments; and that on his death, he having received the price of its alienation, she had a valid claim for that price, first to be paid out of the property of the community, and that failing, out of the property of the husband, and that her claim was entitled to priority of payment.

Such would have been the rights of the parties, if both had continued to reside in France.

Are these rights changed by the circumstance of the husband coming to this country and dying here?

That the price of the wife's immovables thus sold and realized by the husband, constituted a valid debt against him by the laws of France, where this marriage took place, admits of no doubt. Is the debt discharged by the husband's coming to this country?

The rule laid down by Parsons on Contracts (2 Pars., 110), would seem to answer this suggestion. He says: "It is the general rule, both in England and in this country, that the incidents of marriage and contracts in relation to marriage, as settlement of property and the like, are to be construed by the law of the place where these were made; for any different construction cannot be supposed to carry into effect the intentions and agreements of the parties, or to deal with them justly."

Many cases are cited to sustain the text, and among others, those in our own state, of *Decouche v. Savetier*, 3 John. Ch., 190; *Crosby v. Berger*, 3 Ed. Ch., 538, and *De Barants v. Gott*, 6 Barb., 492. These cases hold that where there is an express contract between the parties, that contract will be enforced, and the rights acquired under it maintained and upheld, though there be a change of domicile. Rights dependent on the nuptial contract are governed by the *lex loci contractus*. There would be no difficulty in this case, therefore, in sustaining the rights and claims of the plaintiff, if the provisions of the Code Napoleon had been embraced in an express contract. Some foreign jurists hold that the law of matrimonial domicile attaches all the rights and incidents of marriage to it *proprio*

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vigore, and independent of any supposed consent of the parties. (1 Boullenois Obser., 29, pp. 741, 750, 757, 758; Huberus, Lib. 1, tit. 8, De Confl. Leg., § 9.)

Others hold that there is in such cases an implied consent of the parties to adopt the law of the matrimonial domicile by way of tacit contract, and then the same rule applies as in cases of express nuptial contracts. Dumoulin was the author, or at least the most distinguished advocate, of this doctrine. (Story on Conflict of Laws, § 147.) This rule has also been adopted by Bouhier, Hertius, Pothier, Merlin, and other distinguished jurists. (*Id.*, § 148.)

Story, after reviewing the opinions of jurists and the decisions having a bearing upon the question, sums up the whole by saying, in section 159, that perhaps the most simple and satisfactory exposition of the subject, or at least that which best harmonizes with the analogies of the common law is, that in the case of a marriage, where there is no special nuptial contract, *and there has been no change of domicile*, the law of the place of celebration of the marriage ought to govern the rights of the parties in respect to all personal or movable property, whenever acquired or wherever situate; but that real or immovable property ought to be left to be judged by the *lex rei sitæ*, as not within the reach of any extra-territorial law. When there is any special nuptial contract between the parties, that will furnish a rule for the case, and, as a matter of contract, ought to be carried into effect everywhere, under the general limitations belonging to all classes of contracts.

In this case a new element is introduced by the removal of the husband from France, and consequently a change of his domicile.

In section 161, Story quotes from Bouhier, who lays down the rule in general terms that in relation to the beneficial and pecuniary rights (*les droits utiles et pecuniaries*) of the wife, which result from the matrimonial contract, either express or tacit, the husband has no power by a change of domicile to alter or change them, according to the rule *nemo potest mutare consilium suum in alterius injuriam*, and he insists that this

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is the opinion of jurists generally. To the same effect that the change of domicile by the husband shall not deprive the wife of any separate interests or separate rights she may have, is the case of *Harteau v. Harteau* (14 Pick., 181).

And this rule is a reasonable and proper one. As a general rule, the domicile of the wife follows that of the husband and there is much force in the argument, that in the absence of an express agreement defining the matrimonial rights, the law of the contemplated or any future domicile should govern. But in the case now under consideration, the domicile of the wife has not been changed, and the rights she acquired by the tacit contract made in the matrimonial domicile are not, we think, lost or impaired by the change of the domicile of the husband. Those rights did not mature until the death of the husband. They were postponed till the happening of this event, and then by the law of the matrimonial domicile, by virtue of the tacit contract made between the parties, the right of the wife to a return of all her individual property received by the husband, revives and can be enforced.

We see no reasons of public policy, why rights thus secured should not be recognized or enforced, equally as those arising from an express contract.

The judgment must be affirmed, with costs.

COMSTOCK, Ch. J., DENIO, HOYT and JAMES, Jr., concurred.

MASON, J. (Dissenting.) It is only necessary to state a few familiar and well settled principles of law to show that the judgment of the court below is erroneous, and should be reversed.

The universal doctrine now recognized by the common law is, that the succession to the personal property is governed exclusively by the law of the actual domicile of the intestate at the time of his death. (*Bempde v. Johnstone*, 3 Ves., 198; *Story's Conflict of Laws*, § 481; *Harvey v. Richards*, 1 Mas., 418; *Holmes v. Remsen*, 4 Johns. Ch., 460; 20 J. R.,

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229; *De Couch v. Savatier*, 3 Johns. Ch., 190, 211; *Shultz v. Pulver*, 3 Paige, p. 182; *DeGobry v. DeLastin*, 2 Harr. & Johns., 198; *Hunt v. Moultrie*, 23 N. Y., 394.) The general rule also is, that the law of the testator's domicile, at the time of his death, controls the testamentary disposition of all his personal property, and of all his real property situated within the jurisdiction of the State of his domicile. This is the rule both in England and this country. (*Stanley v. Bernes*, 3 Hagg. Ecc., 373-465; *Moore v. Darrel*, 4th id., 346, 352; *Price v. Dewhurst*, 4 Mil. & Craig, 76, 80, 81; 3 Curt., 468; 2 Sim., p. 7, n. 2; *Matter of Easton's will*, 6 Paige, 187; *Matter of Roberts' will*, 8 Paige, 446, 519; *Thornton v. Curling*, 8 Sim., 810; Story's Conflict of Laws, § 467; *Countess of Ferraris v. Marquis of Hertford*, Eng. Jur., April 1st, 1843, p. 262; 3 Curt., 468; *Desebats v. Berquier*, 1 Binn., 336.) This doctrine has been repeatedly recognized in the American courts. (*Holmes v. Remsen*, 4 Johns. Ch., 460-469; *Harvey v. Richards*, 1 Mason, 381, 408, n; *Dixon's Exec'rs v. Ramsey's Exec'rs*, 3 Cranch, 819; 2 Johns. & Harr., 198; 12 Wheat., 169; 2 Doug., 522; 9 Peters, 488, 504, 505; Story's Conflict of Laws, 468.) The doctrine of the courts is, that there is no difference between the case of succession by testament and intestacy; that they are both governed by the law of the testator or intestate.

There can be no doubt but, from the evidence in the case, the testator's domicile, at the time of his death, was in the State of New York. He quitted France in 1837, and came to this State; was naturalized, under our laws, became a citizen, embarked in business, and resided here until he died, in the year 1849. All the legal requisites necessary to constitute a domicile here, existed in his case—actual residence, naturalization, and the intention to make a permanent residence here. (*Laneurville v. Anderson*, 22 Eng. Law and Eq., 59; *Hoskins v. Mathews*, 35 id., 532; Story's Conflict of Laws, § 44.) Naturalization alone constitutes a most solemn declaration of the intention of the party to abandon his native State and to make the adopted country his domicile and future home, and

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the French law makes this simple fact conclusive evidence of the acquisition of a new domicile. (Code, art. 17.) The fact that the testator actually remained in France up to the death of her husband, and still continues, cannot, in the least, affect the case before us; for the domicile of the husband is the domicile of the wife, and she can have no other or separate one. There can be but one matrimonial domicile at the same time. (*Warrender v. Warrender*, 9 Bligh, N. R., 103, 104; *Greene v. Greene*, 11 Pick., 411; Story's Conflict of Laws, § 41, ch. 55; 2 Parsons on Contracts, 94, 112.) The rule upon this subject is, that woman, on marrying, acquires the domicile of her husband, and changes it with him. (2 Parsons on Contracts, 93, 112; 9 Bligh, 89, 103, 104.)

It seems to me very clear, therefore, that the laws of New York, and not of France, must control in the administration of this property under the will of the testator, as his domicile and his property was here at the time of his death. The laws of France can have no application in such a case as this, which depends solely upon the marital rights, governed, as they all necessarily must be, by the matrimonial domicile at the time of the death of the testator. The court below fell into an error, in following a class of cases which held that ante-nuptial contracts in relation to the settlement of property and the like, are to be determined and sustained by the law of the place where they were made, notwithstanding a change of the matrimonial domicile. The cases referred to by the learned judge, who delivered the opinion of the court below, are all of this character. These cases rest upon express contract and the rules in such cases is that the *lex loci contractus* governs. Such are the cases of *Decouche v. Savatier* (3 Johns. Ch. R., 190); *Orosby v. Berger* (3 Ed. Ch. R., 538); and *De Barante v. Gott* (4 Barb., 492), cited by the court below. The case is very different where the wife's right of property arises by operation of law as a mere incident to the marital relation. In the latter case the right does not rest upon any contract, express or implied, between the parties, but arises solely by the operation of law. It is the silent effect of the relation entered

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into by them, not as in itself implied and fixed in and of the marriage contract, but merely as that contract calls into operation the positive institution of the municipal law (*Lawrence v. Miller*, 1 Sand. S. C. R., 516), and consequently the wife's right of property in such cases is controlled by the domicile of the husband at the time of his death. The French law of community as applicable to the case, does treat the wife as a creditor and the husband as a debtor for what he spends from time to time; but the community continues until the death of the party and the French law steps in and fixes the rules of succession peculiar to itself. Bonati cannot, upon any principle known to our laws, be regarded as a debtor to his wife, and she be allowed to recover as a creditor. There is no evidence in the case that he brought any of the property of the community with him when he came to this country. On the contrary when the defendant was going into proof to rebut any such inference, the plaintiff admitted that she had failed to make any such proof.

It is fair to infer, therefore, that he had spent this money in France, and never held any of it either in trust or otherwise under our laws. I am of opinion for the reasons stated, without considering the other questions in the case, that this judgment should be reversed and the complaint dismissed.

Selden and Lott, Js., did not sit in the case.

Judgment affirmed.

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The statute (ch. 460 of 1837, § 22), upon affidavit of the intention to file objections against the granting of letters testamentary to one of several executors, requires the surrogate to suspend the grant of letters as well to any of the executors not objected to as to those who are.

The issuing of special letters of administration to a collector is discretionary with the surrogate, and though his refusal to appoint such collector

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be put on the ground of his having (erroneously) issued letters testamentary to an executor, this does not render his discretion the subject of review, on appeal. The remedy, if any, is by mandamus.

APPEAL from the Supreme Court. Two different instruments were propounded to the Surrogate of Saratoga county for probate as the last will and testament of James McGregor, deceased; after hearing the proofs the surrogate made a decree admitting one of the instruments to probate, and directing letters testamentary to issue to James McGregor, one of the executors named in such instrument. One of the legatees, named in the will, filed an affidavit stating that he intended to file objections against the granting of letters testamentary to Duncan McGregor, who was also named as executor in the will. Whereupon the surrogate ordered that the granting of letters testamentary to Duncan McGregor be stayed for thirty days. The decree was affirmed at general term in the fourth district.

Judiah Ellsworth, for the appellant.

William A. Beach, for the respondent.

DENIE, J. Duncan McGregor appeals from so much of the surrogate's order as grants letters testamentary to his brother James, and suspends his application for letters until the objections against him as an executor are heard. Duncan and James McGregor, were named executors in the testamentary papers which are established. As soon as the determination of the main question was announced, James applied for letters; but as to Duncan, the coexecutor, an affidavit was made by Basil that he intended to file objections against the issuing of letters to him. Upon this a question arose whether it was the duty of the surrogate immediately to issue letters to James, against whom there was no objection, and afterwards to issue further letters to Duncan, or to refuse them, according to the result of the inquiry as to his fitness; or wholly to suspend the issue of letters until the inquiry should be made so that all the per-

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sons entitled to them should be ascertained. I see no special objection arising out of the character and office of an executor to the issuing of letters from time to time, as qualified persons should appear; for each executor is accountable only for his own proper act or default, and a single executor duly clothed with letters is entitled to represent the estate. But I am of opinion that the legislature have determined that where there is an objection to one of several executors, the issuing of letters is to be suspended as to all until the objections have been determined. The statutory provisions are as follows: Letters testamentary may be granted at any time after the will shall be proved, unless an affidavit shall be made by a legatee, &c., that he intends to file his objections against the granting of such letters to the executors named in the will or some one or more of them, "and upon filing such affidavit with the surrogate he shall stay the granting of letters testamentary for at least thirty days, unless the matter shall be sooner disposed of." (Laws, 1837, ch. 460, § 22.) The natural meaning of these provisions certainly is, that where an affidavit is made against one or more of several executors, the act of granting letters testamentary on the will is to be stayed, not merely as to the executors objected to, but generally. It would have been easy to have qualified the directions to suspend, so that it should relate only to the executor objected to, and this I think would have been done if that had been the intention of the legislature. The necessity of having letters issued as soon as there is one person entitled to take them is not so great as to require a forced construction of the statute to accomplish that result. A provision in section 5 (2 R. S., 70), countenances this construction. It provides for the issuing of supplementary letters when one of several executors was under the disability of non-age, alienage or coverture, at the time the will was proved, and the disability has been subsequently removed. The supplementary letters are to authorize the persons named in them to join in the execution of the will with the persons previously appointed. This, while it proves that there is nothing incongruous in successive letters, shows at the same time that the

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only case contemplated by the legislature for supplementary letters, is that of a particular disability afterwards removed. I am therefore of the opinion that it was erroneous to issue letters to James McGregor, until it was ascertained whether Duncan was also to be named in them.

The branch of this appeal which relates to costs is not well taken. Costs are expressly made discretionary by the statute and we cannot revise the discretion of the surrogate.

The same consideration is fatal to the appeal of Mrs. Vanderwaker and Alexander McGregor, who moved the surrogate for the issuing of special letters of administration, to collect and preserve the property pending the appeal. The statute, in terms, makes the granting of such letters discretionary; and the propriety of issuing or withholding them is plainly dependent upon the exigencies of the estate, the amount and situation of the estate and other circumstances which require to be judged of summarily, and are not suitable to be litigated through the courts upon appeal. The determination of the surrogate upon such questions is, as it should be, summary and exclusive. The surrogate put his refusal to consider the application for special letters, on the ground that he had already issued general letters to James McGregor. If these letters were void, as probable they were, they formed no impediment to his appointment of a collector; but this circumstance will not make the question, which is discretionary in its nature, reviewable on appeal. A mandamus might lie to compel him to hear and determine the application on the merits; but an appeal does not.

The judgment of this court is that the judgment of the Supreme Court affirming the surrogate's decree, so far as it determines what testamentary papers should be admitted to probate and what papers are to be refused probate, be affirmed, with costs, to be paid by the appellant, James Buel; but as to that portion of the decree which awards letters testamentary to James McGregor, it be reversed, without prejudice however, to any future application to be made by said James, for letters to himself separately or jointly with Duncan McGregor. The

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judgment of affirmance by the Supreme Court, of the order made upon the application of Mrs. Vanderwaker and Alexander McGregor, must be affirmed.

All the judges concurring,

Ordered accordingly.

HARTLEY, Executor, &c., v. HARRISON et al.

Where land is conveyed subject to a usurious mortgage, which the grantee assumes to pay, the mortgagee acquires a right to an appropriation of the land for that purpose, which cannot be divested without his assent.

Held, accordingly, that a subsequent arrangement between the parties to the deed, whereby, as between them, it became a mere quitclaim, was inoperative to open the defense of usury to the grantee.

Quære, however, whether the personal liability assumed by the grantee is not discharged by the release of his grantor. So held in the Supreme Court, and the question not passed upon by this court.

APPEAL from the Supreme Court. Action for the foreclosure of three mortgages upon the same premises. The referee, before whom the cause was tried, found these facts: Two of the mortgages executed by Henry Harrison and wife to the plaintiff's testator, in regard to which alone any question was made in the case, were executed upon a usurious agreement for the loan of money. Subsequent to the execution of these mortgages, Henry Harrison and wife conveyed the land in fee to Joseph Harrison, by deed with warranty, containing, among other things, the following provision: "This conveyance is made subject to the payment of the said mortgages, which the party of the second part assumes and covenants to pay as a part of the purchase-money of the said premises." The grantor covenanted that the amount due on the three mortgages did not exceed a specified amount. After issue was joined in the cause the defendants, Henry and Joseph Harrison, interchanged releases to each other of the

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covenants made by them respectively, and also covenanted that the agreement contained in the deed in respect to the mortgages was annulled, and that such conveyance should have the same effect as if such agreement was not contained therein. The referee held that the releases and covenant were inoperative to authorize the grantee of the land to avail himself of the defense of usury—that the relations of the parties to the premises which had been appropriated as the fund for the payment of the mortgage could not be changed without the assent of the plaintiff. He accordingly ordered judgment directing the sale of the land for the payment of the mortgages, but that neither Henry Harrison, the mortgagor, nor Joseph Harrison, his grantee, were personally liable for any deficiency that might arise upon the sale. The judgment having been affirmed at general term in the seventh district, the defendants appealed to this court.

H. Perkins Smith, for the appellants.

John K. Porter, for the respondent.

MASON, J. The rule is a familiar one that when the owner of land mortgages it to secure the payment of a debt, and afterwards sells and conveys the equity of redemption subject to the lien of the mortgage, and the purchaser assumes the payment of the mortgage as a portion of the purchase-money, the latter becomes personally liable for the payment of the debt of the former to the holder of the mortgage. (*Russell v. Pistor and Wife*, 8 Seld., 171, 173, 174; *Halsey v. Read*, 9 Paige, 446; *Marsh v. Pike*, 10 Paige, 595, 597; *Cornell v. Prescott*, 2 Barb. S. C., 16; *Blyer v. Monhalland*, 2 Sandf. Ch., 478; *Ferris v. Crawford*, 2 Denio, 595.) The law is well settled in this state that the purchaser who takes a conveyance of the premises from the mortgagor, subject to the lien and payment of a mortgage, cannot set up the defense of usury against such mortgage and thus obtain an interest in the land which the mortgagor never agreed or intended to transfer to

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him. (*Post v. Dart*, 8 Paige, 641; *Shufelt v. Shufelt*, 9 Paige, 145; *Cole v. Savage*, 10 Paige, 591; *Ferris v. Crawford*, 2 Denio, 598; *Morris v. Floyd*, 5 Barb., 180; *Sands v. Church*, 2 Seld., 347.) The principle upon which these proceed is, that the mortgagor may, if he thinks proper to do so, waive the usury and elect to affirm the mortgage by selling and conveying his property subject to the lien and payment of such mortgage, and the purchaser, in that case, takes the equity of redemption merely and cannot question the validity of the mortgage on ground of usury. It follows, therefore, that Joseph Harrison cannot set up this defense of usury unless the release of Henry Harrison to him, of the covenants and agreements contained in the deed to him executed after the issues in this cause were joined, shall be held to have the effect to discharge him from his liability and authorize him to assert this defense. Now, this release cannot have any such effect. Henry Harrison could not, upon any principle, release Joseph from the liability which he was under to the plaintiff in consequence of his taking a conveyance of the premises subject to the payment of this mortgage. His liability to the plaintiff was fixed the moment he received the conveyance, and it was not in the power of Henry Harrison to release him from it, and this land in his hands became the primary fund for the payments, and neither he himself nor Henry, so far as regards the plaintiff's rights, could discharge him from it or release the land from the lien of these mortgages. This liability when once created was irrevocable, and neither Henry nor Joseph could avoid it. (7 Paige, 615, 639, 640, 641; 5 Seld., 83; 2 Denio, 45; 4 id., 97.) If I am correct in the views above expressed, it follows that the judgment of the court below is correct and should be affirmed.

All the judges concurred in this result except COMSTOCK, Ch. J. They, however, disclaimed any intention to pass upon the question whether the releases were not valid and effectual to discharge the grantee, Joseph Harrison, from any personal liability to the mortgagee for the payment of the mortgages.

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COMSTOCK, Ch. J. (Dissenting.) No judgment has been rendered in this case, affirming the personal liability of Joseph Harrison upon the covenant to pay the mortgage-debts in question, implied from his acceptance of a deed declaring that he assumed to pay them. It is unnecessary, therefore, to inquire whether his liability was discharged by the subsequent release from the grantor in that deed. I have no doubt that such was the effect of the release. Conceding, on the authority of the recent cases in this court, that the holder of the mortgages might sue on the covenant in his own name, it is, nevertheless, true that the mortgagor and grantor was the covenantee, and that the consideration proceeded wholly from him. According to the plainest principles of law, he also could enforce it by action, could lawfully receive a satisfaction of it, and, by necessary consequence, could release and discharge it. But, as the point is not involved, it need not be further considered.

The conveyance in question was, in terms, subject to the prior mortgages. Two of those mortgages were proved to be usurious. Nevertheless, a judgment of foreclosure and sale has been pronounced in respect to all of them, on the ground that the land was so conveyed. This was correct, both on principle and authority, if no effect be given to the instrument afterwards executed by the mortgagor to his grantee. It was supposed by the referee, and by the Supreme Court, which affirmed his decision, that, where land is thus conveyed by a mortgagor, in terms subject to the usurious mortgage, the estate is irrevocably devoted to the payment of the debt, so that no subsequent grant of an absolute interest can affect the mortgagee's right. On this point, I am constrained to differ. A precise idea of the relations of the parties will lead to a correct solution of this question. Where land is mortgaged, and then granted expressly subject to the incumbrance, a mere equity of redemption only is conveyed. So much estate or interest as is necessary for the satisfaction of the mortgage, is not conveyed at all. This is so, whether the mortgage be valid or void. If valid, the interest not conveyed is in the mortgagee. If void, it is necessarily in the mortgagor. To

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say that a void mortgage creates an interest, would be simply to utter a contradiction in terms. Before the conveyance, the mortgagor owns the whole estate, free of the pretended incumbrance. This is no more than that the law says, which declares the incumbrance utterly void. The mortgagor may, therefore, convey the whole estate, or a partial interest, as he pleases. If he sells only a partial interest, he may afterwards sell and convey the whole. If he first grants a mere equity of redemption, he may afterwards grant the residue; because it is his estate absolutely.

The reason why the grantee of land subject in terms to a usurious mortgage cannot defend against it is, that he is a stranger to the contract. He is not in privity, because he does not take the whole interest of the mortgagor. The deed in such a case reserves, or, rather, it does not grant, so much of the estate as is necessary to satisfy the debt. The mortgagee, therefore, has not the mortgagor's situation and rights. A stranger to a usurious contract cannot plead that defense. Such a contract is certainly void in all conceivable circumstances, and is totally incapable of confirmation. But a person unaffected by it in his person or estate, cannot raise the question. The grantee of a mere equity of redemption is in that situation. But if the mortgagor, after so conveying, gives a further assurance, in which he grants the entire estate, in disaffirmance of the void incumbrance, then a privity with the contract is established, and the defense may be interposed by the grantee. That the mortgagor may give successive conveyances of his land until he parts with a complete title, is a very simple proposition. Having a perfect title in spite of the void incumbrance, he may transfer it at such times and by as many assurances as he pleases.

It is sometimes said, that, when a mortgagor conveys in terms subject to the mortgage, he waives the usury. This is certainly true at the time, and in a certain sense. But if the meaning is, that such a deed has any legal efficacy between him and the usurious mortgagee which prevents him from recalling the supposed waiver and disaffirming the contract,

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then the proposition is illogical and false. A borrower may say that he will not set up the usury, or put any one else in a situation to do it. If he persists in that determination, there is nothing in the way of the lender's proceeding upon his securities until he obtains such judgment as the nature of the case admits of. This, of course, is an effectual waiver. More accurately speaking, it is an omission to disaffirm the contract until it is too late. And there cannot be any other waiver. A usurious contract, while it remains executory, is wholly incapable of confirmation. All derivative obligations, all attempts of the borrower to affirm the contract, so long as the taint of usury remains, are nugatory. This is the language of all the authorities, and virtually of the statute itself.

It is said that the debtor may constitute a valid trust for the payment of a usurious demand, and that the trustee can be compelled to execute the trust and pay the debt. I do not stop to inquire how this may be. The proposition was explicitly denied in this court, in *Morse v. Crofoot* (4 Comst., 114, 122). Other authorities may affirm it. In principle I should say, that a trust created to pay a usurious debt is but a further assurance equally void with the original contract. But the question is not material. In this case, there is nothing which has the least resemblance to a trust. Nothing is more common than for a mortgagor to convey his land, subject to the mortgage. Is the grantee a trustee for the mortgagee? Such a doctrine was never before heard of. On the contrary, it has always been considered that the mortgagee, with a power of sale, is a trustee in a certain sense for the owner of the equity of redemption. A conveyance of land subject to a mortgage, is neither more nor less than a simple deed of whatever interest or estate the grantor has after the debt is satisfied out of it. The grantee may free the estate, by paying the incumbrance, or he may suffer it to be sold and take the surplus. He owes no duty, and is charged with no trust. This being confessedly so when the mortgage is a valid lien, it is for those who assert a trust in cases like the present, to show how usury or illegality of any kind can make a difference.

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It is sometimes also loosely said that a grantee, subject to a mortgage, is *estopped* from setting up the usury. This is simply a misnomer, there is no estoppel in such a case. Certainly there is no estoppel *in pais*, because there are no facts to constitute it. There is none by deed, because a man cannot be estopped by deed from setting up usury if there be no other objection to the defense. An affirmation of the most solemn kind under hand and seal that no usury exists, cannot take away the defense, unless some innocent person acts upon the statement, and then it becomes an estoppel *in pais*.

I say then there was no confirmation of these usurious contracts, because that was impossible while they remained executory. The defendant, Joseph Harrison, was not constituted the trustee of any fund for their payment, nor was he affected by any estoppel. None of those grounds afford the reason which prevented him from defending his lands against liens which were usurious and void. The true reason has been stated. His conveyance, being of a partial estate or interest, an equity of redemption only, did not place him in privity with the contracts. His relations to the usury, were therefore those of a mere stranger, in other words he stood in no relation to it. As the owner of an equity of redemption, he held nothing, and he bought nothing, producing a conflict of title or interest between him and the holder of the mortgages.

This was a condition, as we have said, which might be improved by the conveyance to him of a more perfect estate; and it has been shown that the mortgagee, having the whole estate, subject to no valid lien, could make to him a better assurance and give to him the whole title or interest. The remaining question, therefore, is, whether this was done. And I think it was. The instrument subsequently executed was under the hand and seal of the mortgagor; and it declared that the clause in the original deed, stating it to be subject to the mortgages or the payment thereof, was thereby canceled and annulled. A simple deed, without reservation or exception, and professing to convey the whole title, would have been more appropriate to the purpose in view. But I cannot avoid

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the conclusion that the writing, such as it was, had that effect. The parties to a conveyance may undoubtedly, by a new instrument under seal, limit or enlarge the estate granted. To do this is merely to reform the conveyance according to the previous or the present intent of the parties. What the courts of equity often do, can certainly be done by the parties themselves. If a mistake had been alleged, and a judicial decree had been pronounced, amending the clause in the first deed, which subjected the land to the payment of the mortgages, the estate would have been held by the grantee without that qualification. The claim being annulled by the act of the grantor and grantee, clothed in due form, the same result is produced. To cancel the restrictive words of an instrument, is equivalent in law to the making and delivery of a new one without the restriction. It seems to me that argument cannot make this plainer. In reference, therefore, to the two mortgages which were void for usury, the conclusion is inevitable that James Harrison became seised of a full and perfect estate in the premises. This being so, his right to resist those pretended liens is not and cannot be denied. The right of a borrower to defend himself against a usurious demand, is necessarily enjoyed by every person whose property or estate is sought to be affected by such demand.

All the facts upon which the defense of Joseph Harrison depends did not exist at the time when the issue in the case was joined. The further assurance of his grantor was executed after that time and shortly before the trial. In strictness, a supplemental answer might have been necessary. But no objection was made at the trial on this ground. If it had been, a further answer might have been allowed. The question determined was, that the facts did not constitute a defense, and that is the question in this court.

I am of opinion that the judgment should be reversed, and a new trial granted.

Judgment affirmed.

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MARY S. BURR, Administratrix, v. JAMES H. BEERS.

 94 178
 114 214
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 24 178
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A mortgagee may maintain a personal action against a grantee of the mortgaged premises who has assumed to pay the incumbrance. He may pursue this remedy without foreclosing the mortgage and without joining the mortgagor as defendant.

APPEAL from a judgment of the Supreme Court. [The action was brought to recover the amount of two mortgages executed, with his bonds, by E. F. Bullard to John Cramer, committee of the estate of Charles Burr (the plaintiff's intestate), for \$1,000 and \$2,000 respectively. After giving the mortgages, which covered several parcels of lands, Bullard conveyed both parcels to the defendants by a deed containing a recital and covenant in the following words: "Subject to two mortgages held by John Cramer, committee of the estate of Charles Burr, bearing date, &c. [describing the mortgages], which mortgages are deemed and taken as a part of the consideration of this conveyance, and which the party of the second part hereby assumes to pay." (Charles Burr was restored to the possession and control of his estate, by an order of the Supreme Court; and he prosecuted this suit to judgment, but died pending this appeal, when the action was continued in the name of the plaintiff as his administratrix. The plaintiff on the trial proved the actual delivery of the deed by Bullard, to the defendant.] The defendant objected that there was no privity of contract between him and the plaintiff; but the justice (before whom the case was tried without a jury) held otherwise. Judgment was given for the plaintiff for the amount of the mortgages, which was affirmed at a general term when the defendant appealed to this court.]

J. D. Beers, for the appellant.

E. F. Bullard, for the respondent.

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DENIO, J. If the plaintiff had sought to foreclose the mortgages in question, and to charge the defendant with the deficiency which might remain after applying the proceeds of the sale, and had made both the mortgagor and the present defendant parties, the authorities would be abundant to sustain the action in both aspects. (*Curtis v. Tyler*, 9 Paige, 482; *Halsey v. Reed*, id., 446; *March v. Pike*, 10 id., 595; *Blyer v. Monholland*, 2 Sandf. Ch. R., 478; *King v. Whitely*, 10 Paige, 465; *Trotter v. Hughes*, 2 Kern., 74; *Vail v. Foster*, 4 Comst., 312; *Belmont v. Coman*, 22 N. Y., 488.) But I do not understand that the right to a personal judgment for the deficiency is based upon the notion of a direct contract between the grantee of the equity of redemption, and the holder of the mortgage. The cases proceed upon the principle, that the undertaking of the grantee to pay off the incumbrance is a collateral security acquired by the mortgagor, which inures by an equitable subrogation to the benefit of the mortgagee. Then the statute relating to foreclosures provides, that if the mortgage debt be secured by the obligation or other evidence of debt executed by any other person besides the mortgagor, such person may be made a defendant, and may be decreed to pay the deficiency. (2 R. S., p. 191, § 154.) [Chancellor WALTHORTH, puts the right to a personal judgment in such a case, upon the equity of this statute (9 Paige, 482); and Vice-Chancellor SANDFORD, expressly says, that the obligation is not enforced as being made by the grantee of the equity of redemption under such a deed, to the mortgagee, but as a promise by the former to the mortgagor, to pay him the amount of the mortgage, by paying it to the mortgagee in payment of his debt, which promise the mortgagee is equitably entitled to lay hold of and enforce under the equity of the statute referred to. (2 Sandf. Ch. R., 480.)] It is obvious, that the judgment of the Supreme Court in the present case, cannot be sustained upon the doctrine referred to. The plaintiff does not ask to foreclose the mortgage and does not make the principal debtor Bullard, a party. If the judgment can be supported at all, it must be upon the broad principle that

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if one person make a promise to another, for the benefit of a third person, that third person may maintain an action on the promise. Upon that question there has been a good deal of conflict of judicial opinion. As long ago as 1817, Chancellor KENT, laid it down as a point decided, and referred to not less than eight English and American cases, as sustaining the principle. (*Cumberland v. Codrington*, 3 J. C. R., 255); and since then it has been frequently affirmed by judges, after an attentive examination of cases, as in *Barker v. Bucklin* (2 Denio, 45), and in the cases therein referred to. These cases, and also those referred to by Chancellor KENT, are doubtless subject to some of the criticisms which have since been applied to them. Some of the opinions were pure *obiter dicta*, and in others, the cases though presenting the point were decided upon other grounds. It cannot however be denied, that the doctrine had been so often asserted, that it had become the prevailing opinion of the profession, that an action would lie in such a case in the name of the creditor, for whose benefit the promise was made. Finally the question came squarely before this court in *Lawrence v. Fox* (20 N. Y., 268), and we held, with hesitation on the part of a portion of the judges who concurred, while others dissented, that the action would lie. We must therefore regard the point as definitely settled, so far as the courts of this State are concerned.¹

The judgment appealed from being in accordance with the law as adjudged in that case, must be affirmed. /

LOTT, J., also delivered an opinion for affirmance, and all the judges concurred.

Judgment affirmed.

END OF CASES DECIDED AT DECEMBER TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,
March Term, 1902.

54	181
194	62
194	200

WELLS v. THE NEW YORK CENTRAL RAILROAD COMPANY.

A contract between a railroad corporation and a gratuitous passenger by which the former is exempted from liability under any circumstances of the negligence of its agents for any injury to the passenger is not against law or public policy and is valid.

It is immaterial whether the negligence of the agents be slight or gross. The supposed distinction between different degrees of negligence, in respect to the liability of common carriers, discarded as illusory and impracticable.

APPEAL from the Supreme Court. Action to recover damages for injuries sustained by the plaintiff, a passenger upon the defendant's road, from a collision between the train in which he was riding and a freight train carelessly left standing upon the track in the night time. The plaintiff paid no fare, but was carried under a free ticket, on which were printed the following words: "The person accepting this free ticket assumes all risks of accidents, and expressly agrees that the company shall not be liable under any cir-

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circumstances, whether of negligence of their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using this ticket." The trial was by the court, a jury being waived; the only evidence received being a stipulation between the parties, and the pleadings.

The complaint was, that the injuries to the plaintiff were caused by, or resulted from, the negligence of the defendants simply, without characterizing that negligence by the vituperative epithet gross, or culpable, or by any other terms or epithet. The answer of the defendants did not deny the negligence, but set up the contract in bar of the action.

The judgment at the circuit or special term, was rendered upon a statement of facts settled and submitted by stipulation of the parties. By this statement, the defendants admitted that the injuries to the person of the plaintiff "were occasioned through and by means of the carelessness and negligence of the defendants and their agents and servants;" but in the statement nothing was said about the negligence being gross.

The justice at the circuit upon the facts so agreed upon and submitted to him by the parties, found and decided, as matter of fact, that the injuries complained of were occasioned by the gross negligence of the defendants, their agents and servants; giving judgment in favor of the plaintiff, as appears from his opinion, on the ground, that the contract was not valid so far as to exempt the defendants from liability for gross negligence.

This judgment was reversed by the general term upon the ground, that, if there was any such practical distinction between gross and any other kind or degree of negligence, as the justice at the circuit seemed to suppose that the contract was valid and effectual to protect the defendant from liability for gross as well as any other kind or degree of negligence.

The plaintiff appealed to this court.

Amasa J. Parker, for the appellant.

Sidney T. Fairchild, for the respondent.

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GOULD, J. There being made some question whether the indorsement on the ticket ("the person *accepting* this free ticket assumes all risks, &c., and expressly *agrees*," &c.) is a contract, on the part of the passenger, with the company; it seems necessary to say that the word "agreed" means the concurrence of two parties; and that the act of acceptance binds the acceptor as fully as his hand and seal would. (Co. Litt., § 217, note; 5 Hill, 258, 259; 1 Seld., 229; 27 Barb., 140; and cases there cited.) The point is too well settled to admit of debate.

The true questions in the case arise upon the legality of such a contract; and what acts or omissions it does, by fair construction, cover. The terms, "negligence," "ordinary negligence," "gross negligence," had their origin in the rules of law as fixed in regard to bailments, generally; and not in regard merely to the duty of common carriers, since they were held responsible for any and every degree of negligence. But a naked depositary, without reward, was responsible only for gross negligence; and gross negligence, in that use of the term, was considered as evidence of fraud; and, unexplained, equivalent to fraud. (Jones' Bail., 36, 46.) The term has since been used, in reference to common carriers of goods, as pointing out such acts as they were not at liberty to exempt themselves from liability for, even by an express contract, in terms covering them. That they could not so exempt themselves was decided upon grounds of public policy—evidently for the reason that such acts were evidence of fraud, or willful injury; and that a carrier of goods was in so absolute and unwatched control of the goods, that it would not answer to allow him to rebut such evidence. And it is of course the law, that no one can, by contract, shield himself from liability for his own fraud, or for his own willful acts.

Holding this to be the true reason of the rule, and its right interpretation, and granting that it applies to individual carriers of persons, does it apply to corporations, which carry persons? Fraud and willful misfeasance include a will, a motive; and a corporation, as such, can have no motive, no will;

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though its agents may have both. Still it would hardly do to hold the property of corporators liable for the willful or criminal act of a person employed by the corporation. Such acts cannot be said to be done in the course of his employment.

Were a switchman willfully to misplace a switch, so that a train of cars were thrown off, and many passengers killed; the man would be guilty of homicide; but the railroad company could not be held responsible for the damages, any more than could the owner of a carriage and horses, should his driver willfully run them among a crowd of persons, trampling and crushing all before him.

As to the construction of the contract; it would seem, from what has been said, that the term "*gross negligence*," as used in the law, has a technical meaning, which is not properly applicable to those acts of servants of a corporation, for which the corporation is responsible; though as between their acts, which are slightly negligent, and those which are very negligent, there is no different rule of responsibility. It is the fact of negligence (mere negligence), and not its degree, which incurs the liability.

This being so, and taking the terms of this contract, "the company shall not be liable under any circumstances, whether of negligence of their agents or otherwise, for any injury, &c., of the passenger using this ticket;"—against what liability does it contract? We are not to give it a construction that would make it illegal, unless that be the only fair construction; and its plain purport provides against "circumstances of *negligence*;" the words "or otherwise" being too vague to be held to bear an illegal meaning. It is, then, a contract not to be liable for the mere negligence of the agents of the company.

I am aware that the judge, at the circuit has found that the act of the agents, in this case, was one of "*gross negligence*." But in so finding he has gone beyond the stipulation as to the facts; which is that the injuries were occasioned by means of the negligence of the agents; the stipulation covering the same ground as the contract, and the complaint making no other allegation. And the case must be considered as if the

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word "*gross*" were omitted in the finding, as it is in the evidence (or stipulation): had the plaintiff wished it in his case, he should have said so, and put it there.

Upon the reasoning above, and upon any legal principle—whether founded upon public policy, or otherwise—there seems to be nothing illegal in such a contract. It cannot, reasonably, be said that because five or ten, persons on a train that carries two hundred, have such passes, there is the less inducement to care on the part of the company, or its agents; or that a feeling of indifference to human life would be thereby caused. The *quantum* of interest, the ratio of motive, is too utterly insignificant, when compared with the vast liability not protected by any contract, and binding the company and its agents to every measure of caution. That agents will be careless; that no considerations are sufficient to induce constant vigilance; we have frequent and terrible proofs. But the holding of such contracts illegal would not even tend to alter the fact.

Independently of, or rather in accordance with, these views upon principle, the case of Wells and Tucker against the Steam Navigation Company (4 Seld., 875), seems an authority of the same general tendency. Although it was there held that the words "at the risk of the owner," did not cover the proved acts of the agents of the defendant; and although the case uses the term "gross negligence" in a sense different from the one above given to it, still the case holds that those defendants did not, not that they could not, protect themselves from liability in the case proved. And (at p. 881), Judge GARDINER said, "Although the law will not suffer a man to claim immunity by contract against his own fraud, *I know no reason why this may not be done in reference to fraud or felony committed by those in his employment.*" It is by no means necessary, to go so far now, but, *a fortiori*, he may; protect himself by contract against the negligence, in any degree of his agents.

The judgment of the Supreme Court should be affirmed.

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DENIO, DAVIES, ALLEN and SMITH, Js., concurred.

SUTHERLAND, J. (Dissenting.) I have no doubt that the plaintiff by accepting the free ticket or pass with the notice printed on the back of it, which he must be presumed to have seen before taking his seat in the cars, intended to contract, and did contract with the defendants, to take upon himself all risk of the passage, not only from accident but from negligence, in consideration of the undertaking on the part of the defendants to carry him free.

The words of the notice are certainly broad enough to include injuries from any kind or degree of negligence culpable, gross, or otherwise, either of the defendants, or of their agents, or employees. The words are "That the company shall not be liable under *any circumstances*, whether of negligence of their agents, *or otherwise*, for any injury to the person," &c.

The question as to the supposed distinction between gross and slight or ordinary negligence is, I think, very fairly presented in this case; for if there is really this distinction (a distinction so important, taken not with reference to a question of damages, but with reference to the validity of the contract itself), I do not see how the justice at the circuit, outside of the stipulation of the parties, was authorized to find and decide, as matter of fact, that the injury to the plaintiff was occasioned by the gross negligence of the defendants, their agents, and servants.

If there is no such practical distinction, which can properly and legally be recognized by a court as bearing on the construction, or the question of the validity of the contract, then the finding of the justice at the circuit, that the negligence was gross, may be considered immaterial: for gross negligence certainly includes negligence.

It has been doubted of late, whether the formal division or classification of negligence in the abstract into gross, ordinary, and slight, recognized in the books, has been useful; indeed, whether it has not tended to produce confusion. (See *Steamboat New World v. King*, 16 How., 474; *Wilson v. Brett*, 11

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Mees. & Wels, 118; *Hintin v. Dibbin*, 2 Ad. & Ell., N. S., 646, 661; *Blyth. v. Waterworks*, 36 Eng. Law & Eq., 506; S. C., 11 Exch., 781; Angell on Carriers, 8d ed., §§ 22, 23.

This classification of negligence which grew out of the classification of bailments, and which has been considered more particularly applicable to questions of negligence as between bailor and bailee, is founded but upon one circumstance, that is the circumstance of benefit to the bailor, or to the bailee, or of mutual benefit. This circumstance, either of mutual benefit, or of benefit to one or other of the parties only, being a circumstance common to all bailments, was made the foundation or principle of the classification; but it is evident, from the very nature of the subject, that it is and must be a mere abstract, philosophical classification, of little or no use in practice. Courts deal with cases.

Practically, negligence is the want or absence of the care and attention required by all the circumstances of each particular case. This care and attention is enjoined and enforced by the law, in some cases as a social duty; merely, in other cases, on the ground that a particular trust was assumed or undertaken. It is doubtful, whether the care and attention required of a party by the law to free him from the charge of negligence in a particular case can be defined otherwise than as that care and attention which experience has found reasonable and necessary to prevent injury to others in like cases. In all cases of negligence, practically on the trial, the question is, whether the defendant is guilty of negligence, not whether he is guilty of gross, or slight, or ordinary negligence. The negligence may be gross, or slight—as an assault may be gross or slight, but the question of liability, is a question of actionable negligence under all the circumstances of the particular case. At common law the declaration against an unpaid or gratuitous bailee for the loss of the goods of the bailor, did not charge gross negligence, but negligence.

Assuming it to be the law, and to be reasonable, that less care and attention is required of an unpaid bailee or agent, than of a paid one, yet the fact of the bailee or agent being

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paid, or not paid, is only a circumstance to be taken into consideration with all the other circumstances of the case, in determining whether a bailee or agent has been guilty of negligence in a particular case; and in an action against an unpaid bailee or agent, the question really is, not whether the unpaid bailee or agent has been guilty of gross negligence, but whether he has been guilty of negligence, that is, whether in executing his gratuitous trust, he used the care and attention required by all the circumstances of the case, including the circumstance that the trust was gratuitous. An unpaid bailee or agent, is required to take more care of a box of diamonds than of a box of sugar-plums: more care might be required in the city than the country; less care might be required and expected of a very old man, than of a man in the prime of life. A judge may say to a jury that an unpaid bailee or agent is liable only for gross negligence, but if he says this with proper explanations, the jury ought to understand by it nothing more than that the law requires less care and attention from an unpaid than a paid bailee or agent, and that the actionable negligence of an unpaid bailee or agent is called gross negligence. If the phrase gross negligence has any other legal or legitimate meaning on a question of liability for negligence, than the negligence of an unpaid bailee or agent, which causes an injury for which the law gives a remedy, I am not able to discover it. Every question of legal liability for negligence, is a question of liability under all the circumstances of the case, for negligence simply. The forms of pleading at common law in actions for negligence show this. In this case the defendants admitted that the injuries to the person of the plaintiff complained of, were caused by negligence.

An injury to the person of one, caused by or resulting from the negligence of another, is a tort. Even the form of assumpsit was not allowed by the common law to enforce a remedy for such an injury to the person.

It is a tort, because the negligence which causes it is the breach of a legal duty, not of a contract. (*Nelton v. Western R. R. Co.*, 15 N. Y., 444; *Philadelphia and Reading R. R. Co. v.*

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Derby, 14 How. U. S. R., 486; *Steamboat New World v. King*, 16 id., 474.)

Certainly every kind or degree of negligence, whether it be called gross or ordinary, or slight, which causes an injury to another, for which the law gives a remedy, as for a tort, is and may be called culpable.

The slightest negligence may result in the greatest injury, even in the loss of many lives; the grossest negligence may result in the slightest injury. It is the business of the defendants to carry car-loads of human beings at fearful speed by steam. It has been said that any negligence, the slightest, in conducting such a business, may well be called gross. (See case in 14 How. U. S. R., above cited.) Call the admitted negligence of the defendants, their agents and servants gross or slight, or apply to it any other epithet, and the injury to the plaintiff remains the same: the tort remains the same.

It is sometimes said that gross negligence implies, or is equivalent to fraud, but this saying, it seems, cannot be said to be an established legal principle, and it certainly is not practically true. (Story on Bail., §§ 19-23; 1 Parsons on Con., 214, n. a.)

The learned justice who rendered the judgment in this case at the circuit, in finding that the injury to the plaintiff was occasioned by gross negligence, certainly did not intend to charge the defendants, or their agents, or servants, with fraud, or with any intentional wrong. The facts submitted to him would authorize no such charge.

These considerations make it plain to me, that on the question of the validity of the contract between the parties in this case, it was utterly immaterial whether the negligence complained of was gross or slight, or was called gross or slight. Negligence resulting in an injury to another is actionable and culpable as a tort. Whether it is gross or slight (using these words in the sense in which they are used in common parlance, not in the sense of the abstract classification above referred to,) might perhaps be considered on the question of damages, but in this case the amount of damages to be recovered, if a reco-

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very was had, was fixed by the stipulation of the parties; and the finding of the judge therefore, that the negligence was gross, was not only immaterial on the question of the validity of the contract, but in every view was outside of the case. It is plain to me, too, that the distinction between gross and other negligence taken at the circuit, on the question of the validity of the contract, never would have been attempted, or thought of, but for the confusion in the cases, resulting from the abstract and impracticable classification of negligence above referred to, and the saying often met with in the books, that gross negligence is the same as or equivalent to fraud.

The classification may be philosophically correct, but it is impracticable; and attempts to make it useful and practicable have produced confusion, and made it mischievous. As to the saying about gross negligence being the same as fraud, the authorities cited, and common sense, show that it should be considered a barren generality; at least barren of good. Negligence, no doubt, may be so gross as to go to show fraud; and when fraud is alleged as the cause of action, may be proved for that purpose.

Assuming then that the delivery and acceptance of the free ticket constituted a contract between the parties, the only question on the admitted facts of this case is, whether the contract is valid and should be enforced, so as to bar the plaintiff from maintaining this action for injuries to his person, resulting from the admitted negligence of the defendants, their agents and servants?

After a careful consideration of this important question, I have come to the conclusion that the contract is illegal and void, and should be held to be so, as against public policy, as declared both by the common law and statute law.

If A request B to beat another, and promise to save him harmless, the promise is void. So if A promise, in consideration of twenty shillings paid to him by B, he will pay B forty shillings if he does not beat G. S. out of such a close, the promise is void. These are cases put in the books, and it said that the contracts are illegal as "*contra bonos mores*." (2 Lev.,

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174; Hutton, 56; Comyn on Con., §1; *Coventry v. Barton*, 17 John., 142.)

It can also be said that such contracts are void, as against the policy of the law punishing such breaches of the peace as misdemeanors. If A offer to pay B five dollars, to promise that he will not take the law of A if A strikes him, and B take the five dollars and make the promise, and thereupon A strikes B, no one would suggest that B's promise was valid; but would it not be proper to say that the promise is void, as against the policy of the law punishing the battery as a crime? Certainly any contract which induces, or tends to induce, or encourage the commission of any crime can properly be said to be void, as against the policy of the law declaring and punishing the crime. After the actual commission of the battery B could abandon or settle his claim for damages as he saw fit, but before the commission of the offence, he could not lawfully agree not to prosecute for such damages without encouraging a public wrong. In advance of the actual commission of the offence, he could not by contract lay aside the protection of the law for his private and individual benefit without interfering with public interests and the policy of the law punishing the battery as a crime, and therefore the maxim, "*modus et conventus vincunt legem*," would not apply.

It is said that a promise to indemnify one for committing a trespass, the party to be indemnified knowing at the time that the act to be done would be a trespass, would be void. (*Coventry v. Barton*, 17 John., 143, before cited; *Stone v. Hooker*, 9 Cow., 154.) By the common law, one by whose negligence, even in the prosecution of his lawful business, another was killed, was guilty of manslaughter. (1 East. P. C., p. 262, § 38.) By the Revised Statutes, the killing of one by the culpable negligence of another, whilst engaged in the prosecution of his lawful business, is manslaughter in the 4th degree. (2 R. S., pp. 661, 662, §§ 6, 13 and 19.)

The words of the statute are culpable (not gross) negligence. Any negligence which is actionable or indictable is certainly

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culpable. The word culpable, as used in the statute, can have no other meaning. It would be absurd and repugnant to the nature and any definition of negligence, to say that the word culpable in the statute implies intention, or the phrase culpable negligence, an intentional wrong. If the absence or want of due care, caution, attention, or diligence in the particular case, which is called negligence, causes an injury to another, which results in death, it is by the statute, and was at common law, indictable.

The act of December 18, 1847, for the benefit of the widow and next of kin of a person whose death has been caused by negligence, not only gives a new remedy or action unknown to the common law, plainly of the nature of a penalty, but by that act, as amended in 1849, every agent, engineer, conductor, or other person, through whose wrongful (not gross) neglect the death of a person shall have been caused, is liable to be indicted therefor.

Is it necessary to advert to any other law or consideration than the common law, and these statutes punishing negligence as a crime, to show that the protection of human life from negligence is a matter of public interest, of public policy? And is it not plain that any contract which may induce or lead, or tend to induce or lead, to a relaxation of the care and attention required by the law as a social duty for the protection of human life, interferes with this public policy, and should be held void, as against the policy of the laws declaring it? The negligence which caused the injury to the plaintiff might have caused his death and the death of many others.

If the plaintiff had paid full fare, and taken the risk of the passage upon himself, his contract would have been void for want of consideration, the defendants being under an admitted obligation to carry all passengers who present themselves on offering to pay the usual fare; but if the contract which the plaintiff did make is held valid, what is to prevent the defendants, or any other railroad corporation putting the fare up nominally to the legal limit, and making a bargain with all their passengers who will consent to enter into such an arrange-

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ment, to reduce their fare one-eighth or one-sixteenth of a cent per mile in consideration of their taking upon themselves the risk of the passage. The railroad corporation might thus make money by depriving the public of the protection afforded by their legal liability in damages for negligence. If the undertaking of the defendants to carry the plaintiff free, or without the payment of any money, was a sufficient consideration for the plaintiff's contract to take the risk of the passage upon himself, then a reduction of his fare, however small, would have been a sufficient consideration for such contract. It certainly cannot be necessary to show that liability in damages for a want of care promotes care; and that an extinction of such liability would tend to promote negligence. We certainly have a right to assume that railroad corporations, like individuals, are influenced by motives of self-interest.

The defendants' business is the carrying of passengers on iron rails by steam at great speed. The law requires of them, their agents, and employees, in carrying on that business, the utmost care, all the care that human foresight is capable of. (*Stokes v. Saltonstall*, 13 Pet., 181-193; *Philadelphia and Reading R. R. Co. v. Derby*, 14 How. U. S. R., 486; *Steamboat New World v. King*, 16 How. U. S. R., 474; *Caldwell v. Murphy*, 1 Duer, 233; *Camden and Amboy R. R. Co. v. Burke*, 13 Wend., 611.)

The duty to use this extraordinary care, is a legal duty independent of any contract with, or fare, or consideration paid by, their passengers. (*Nolton v. Western R. R. Co.*, 15 N. Y., and *Philadelphia and Reading R. R. Co. v. Derby*, 14 How. U. S. R., before cited.)

Did not public policy originate this requirement of the law? Would it be consistent with this requirement of the law or its policy, to permit railroad corporations to make and enforce contracts with their passengers tending to promote a relaxation of the very care in the selection of their employees and otherwise, which it is the object of this requirement of the law to secure?

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But we have so far taken only a very limited view of this question of public policy. All laws punishing crimes against the person, and against the public health, show that the life and health of a citizen is a matter of public interest, of the greatest public consideration. That its citizens constitute the strength and wealth of a State, is an elementary principle of political economy. It certainly cannot be said, that a man has either a moral or legal right to speculate with his own life; or to make any contract tending to remove the safeguards which the law places around it.

It is plain to me from the above general considerations, that the extraordinary liability of the defendants in damages for negligence as carriers of passengers, was not declared by law, nor is it enforced by law, for the benefit only of the party injured in any particular case; but, it was declared and is enforced for the benefit of the public also; and therefore a passenger cannot by contract in advance of the injury, lay aside even his individual benefit from the law or rule of liability. The maxim, "*quilibet potest renunciare juri pro se introducto*" does not apply in such a case. Public considerations and the policy of the rule or liability itself, forbid that it should.

I think, too, it may be said that to enforce the contract in question, would interfere with the policy of the very laws from which the defendants derive their existence and their powers. (Laws of 1853, ch. 76; Laws of 1850, ch. 140.)

They are a private corporation, yet in theory, at least, they were incorporated from public considerations, and for the public good. Hence the powers given to them which interfere so materially with private rights.

They are constituted carriers of persons and property (Laws of 1850, ch. 140, §§ 1, 36), and are expressly made liable for any damages occasioned by their neglect of duty.

As carriers of passengers as well as of property, they may be considered as acting in a public capacity, and as a kind of public officers. (*Bretherton v. Wood*, 3 Brod. & Bing., 54; *S. C.*, 9 Price R., 408.)

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Their admitted obligation to carry all passengers who present themselves and are to pay the usual fare, is conclusive evidence that they are considered as acting in a public capacity in carrying passengers.

The care and diligence, then, expressly imposed upon them as carriers of passengers by the very law defining their powers and duties as a corporation, is imposed upon them as a public duty.

Can it be said, that any contract tending to prevent, or relax, or modify the performance of a public duty imposed by law, is valid? Is not such a contract void, as against the policy of the law imposing the duty?

Moreover, I think it can properly be said, that the defendants had no power to enter into the contract or arrangement which was made with the plaintiff. And on this question of power, all the considerations of public policy before adverted to are proper and apply. It was a speculative contract outside of their charter. It cannot properly be said that they undertook to carry the plaintiff free or without consideration. They undertook to carry him in consideration of his agreeing not to hold them responsible for any injury, even for an injury resulting from their neglect of a legal public duty.

Can it be supposed, that the legislature ever intended to give the defendants, the implied right or power to enter into any such contract or arrangement with their passengers? I think not. All the considerations of public policy before adverted to forbid the idea.

The duty of due care and diligence is cast upon the defendants by the law creating them a corporation, and they cannot cast it off by contract.

It has been said that the cases holding, that a servant cannot recover of his master for the negligence of his fellow servant in the same business or employment, show that the contract in question is valid.

It is said, I believe, in some of the cases, that these decisions rest partly upon the ground, that the servant entering into the employment must be supposed to contract to take upon him-

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self the risks of the negligence of his fellow servants. But there really is not in such cases any contract, express or implied.

The general rule of law is, that the master is responsible for the negligence of the servant. The real ground of the decisions, last referred to, I take to be, that the policy of the rule itself does not require its application in such cases. The reason of the rule ceasing in such cases, the rule is not applied. Indeed, it may be said, that the policy of the rule itself is promoted by not applying it in such cases; for it is evident, that by not applying it, it is made the interest of servants to be watchful of each other, and to inform the master of each other's delinquencies.

My conclusion, is, that the judgment of the general term in this case should be reversed, and the judgment of the justice at the circuit or special term affirmed, not upon the ground that the injury to the plaintiff was caused by gross negligence, but upon the ground that it was caused by the negligence of the defendants, their agents and servants; and upon the ground that the contract of the plaintiff to exempt the defendants from responsibility for such negligence was, and is, illegal and void, for the reasons, and on the grounds above stated.

WRIGHT, J., also dissented; SELDEN, Ch. J., was absent.

Judgment affirmed.

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195	432

PERKINS, Administratrix, *v.* THE NEW YORK CENTRAL
RAILROAD COMPANY.

A railroad corporation cannot, by contract, exempt itself from liability to a passenger for damage resulting from its own wilful misconduct or recklessness which is equivalent thereto.

But in respect to a gratuitous passenger it may contract for exemption from liability for any degree of negligence in its servants, other than

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the board of directors or managers who represent the corporation itself, for all general purposes.

Whether the corporation is liable to a free passenger, so contracting, for negligence in the construction of the road, as upon an implied guaranty of its security, when the misconduct from which the injury resulted was that of a trackmaster who, knowingly, used rotten material in building a bridge, there being no evidence that it was known to the superior managing officers. *Quære.*

APPEAL from the Supreme Court. Upon the trial, these facts appeared: On the 10th of May, 1858, the plaintiff's husband, William H. Perkins, applied to one of the directors of the defendants' Company for a free pass on the defendants' railroad from Rochester to Albany and back, and received a pass in the words and figures following:

"NEW YORK CENTRAL RAILROAD COMPANY,

"*Rochester, May 10, 1858.*

"Pass W. H. Perkins, Esq. (transp't of Smith, Perkins & Co.), as per conditions on the other side of this ticket, to Albany and back, 1858, unless otherwise ordered.

"J. GOULD, *Director.*"

On the reverse was printed:

"NOTICE.—The person accepting this free ticket assumes all risk of accidents, and expressly agrees that the Company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the property, of the passenger using this ticket. If presented by any other person than the individual named therein, the conductor will take up this ticket. This pass is not to be presented or used by the holder to procure a pass over any other road."

Perkins' attention was called to the conditions on the back of the ticket when he received it. He started from Rochester, in a train of the defendants' railroad, on the morning of the 11th of May, and was killed in consequence of the breaking down of a bridge over the Sauquoit creek. The train was an

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ordinary passenger train, with four coaches, well filled with passengers, several of whom, besides Perkins, were killed. Another train, going west, was passing the bridge at the same time, and also broke through said bridge.

The plaintiff gave evidence tending to prove that the bridge was built of unsuitable materials, and that some of the timbers were rotten. It appeared that the bridge was built in 1855, under the direction of William Evarts, trackmaster of the defendants upon that portion of their road which included the Sauquoit creek; that the span was forty feet; that it had six chords, five of which were of water-elm. Proof was given that this wood was unfit for bridges; that the elm was rotten when put into the bridge, so much so that auger chips pulverized when rubbed in the hands. It further appeared that the attention of Evarts had been called to the condition of this timber, and its rottenness was shown to him when the workmen were preparing it for use, and that he persisted in putting it in, saying it was the best they had and it must go in. There was no evidence given by the defendants on these points.

The defendants showed that Perkins was riding on the free pass aforesaid when the accident happened.

Upon these facts the judge charged that, "if Perkins was riding upon the free pass, he was riding upon the conditions annexed to it. But, notwithstanding such conditions, if the negligence of the defendants was gross and culpable; if it was of such a character that it would subject the party to prosecution for fraud or crime; then it does not come within those conditions. In other words, that, if this ticket is in the nature of a contract, the parties to the contract did not contemplate such cases as are fraudulent or criminal in their character.

"That the statute provides that when culpable negligence causes the death of a party, such negligence amounts to a felony. If you shall find that negligence in the construction of the bridge, or in suffering it to remain in that condition, was gross and culpable in its character amounting to a fraud or crime; the defendant is liable notwithstanding the conditions of the pass, and you are to determine from the evidence

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what the character of this negligence was. You will look at this case exactly as if Evarts, the trackmaster, was the owner of the road, and if there was such a degree of negligence as to amount to gross or culpable negligence on his part, such as would subject him to indictment for manslaughter had he been the owner of the road; then the defendants are liable because his negligence is their negligence. The statute, in regard to such negligence, is this: [reading the statute definitive of manslaughter in the 4th degree for culpable negligence.] If the negligence of the trackmaster came up to this, so that he would be indictable, the defendants are liable although Mr. Perkins was riding on a free pass and notwithstanding its conditions."

The several propositions in this charge were duly excepted to.

The counsel for the defendant presented several requests to charge, which were also refused and exceptions duly taken.

The court, with the consent of the counsel for the respective parties, directed the jury, at the time of rendering their verdict, to answer the following question:

Was Mr. Perkins, on his trip at the time of the accident, riding on the free pass delivered to him by Gen. Gould?

The jury found a verdict for the plaintiff for \$5,000, and answered the foregoing question in the affirmative. The judgment upon the verdict was affirmed at general term in the seventh district, and the defendant appealed to this court.

Sidney T. Fairchild, for the appellant.

George F. Danforth, for the respondent.

E. D. SMITH, J. The death of the intestate was caused and occasioned under circumstances which, if he had merely sustained a bodily injury from which he had recovered, would unquestionably have entitled him to maintain an action for such injury, unless he had debarred himself from such action by accepting and riding upon a free ticket.

The plaintiff's right of action, under the statutes of 1847 and 1849, depends upon the same circumstances. Unless Mr.

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Perkins, if he had survived the injury which resulted in his death, could have maintained an action for such injury, his widow and next of kin clearly cannot maintain this action. The statutes of 1847 and 1849 give to the personal representatives of a deceased person whose death is caused by the wrongful act, neglect or default of any person or corporation, an action to recover a fair and just compensation not exceeding \$5,000, with reference to the pecuniary injury resulting from such death. This is a new and original cause of action given by, and depending wholly upon, the statute. The damages recoverable in such case depends upon entirely different principles from those recoverable by the person injured in case death had not ensued from the injury. In such case, the person injured would only recover compensatory damages personal to himself, including expenses incurred and losses sustained in consequences of the injury. (*Lincoln v. The Saratoga and Schenectady Railroad Company*, 23 Wend., 425.)

But, in the case where death results from the injury, the pecuniary value of the life of the person killed, to the next of kin, is the measure of damages, to the extent of five thousand dollars. (*Whitford v. The Panama R. R. Co.*, 23 N. Y., 467; *Blake v. The Midland Railway Co.*, 10 Eng. L. & Eq., 448.)

Assuming that the pass on which the deceased was riding is to be regarded as a free ticket, and that the defendants were carrying the deceased gratuitously, independently of the question whether Mr. Perkins expressly agreed to assume all risk of accidents upon the trip, the defendants would be clearly liable for any injury sustained by him if he had survived the same; and in this action, on the same ground, would be liable also to the plaintiff.

Having received the deceased into their cars, they would, in this view, be bound to carry him safely. They were and are not bound to carry him or any person gratuitously; but, undertaking to carry him, they must do it carefully, as with other passengers. This was settled, in principle, in the case of *Coggs v. Bernard* (2 Ld. Raym., 909). In that case the defendant undertook to take up several hogheads of brandy,

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then in a certain cellar, and lay them down again in a certain other cellar, and did the work so carelessly that one of the casks was stayed and a great quantity of the brandy lost. The defendant was a mere private person, and it was claimed that, as he was not a common porter, and was acting gratuitously, he was not liable. But, upon very full argument, and after much consideration, it was held that, having assumed and undertaken to do the work, he was bound to do it carefully, and was liable for any injury resulting from his negligence.

This precise question was decided in this court in *Nolton v. Western Railroad Company* (15 N. Y., 444), and in the Supreme Court of the United States in *The Philadelphia and Reading Railroad Co. v. Derby* (14 How., 468;) in *Steamboat New World v. King* (16 id., 477); and in *Gilpinwater v. The Madison and Indianapolis Railroad Company* (5 Ind. [Porter], 349).

The next inquiry is, whether the ticket upon which Mr. Perkins was riding was, in legal effect, anything more than a notice. It is well settled in this State that common carriers cannot limit their responsibility by a notice. This has been deemed settled law since the decision of the cases of *Holliester v. Nowlen* (19 Wend., 234), and *Cole v. Goodwin* (id., 251). But this ticket can hardly be regarded as a mere notice. If Mr. Perkins had applied to purchase a ticket in the ordinary way, or had paid for his passage like passengers generally, and had received this ticket for his money and as his authority to get into and ride in the defendants' cars, the ticket should probably be regarded as a mere receipt and voucher for his fare, and could not, I think, be regarded as an agreement on his part to take the risk of accidents; for the defendants could not, in such case, by their own act, enforce or impose any such agreement upon the passenger, or compel him to relinquish his legal right to be safely transported. The carrier clearly cannot limit his responsibility by his own act. (6 How. U. S., 382.)

But he did not apply to purchase a ticket. He did not pay his passage, or contemplate riding in the defendants' cars like ordinary passengers, paying full fare.

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Applying for a pass, or free ticket; taking it and having it in his possession some six or eight hours before the starting of the train in which he was to go; and having his attention expressly called to its terms, taken in connection with the fact, found by the jury, that he was, at the time of the accident, actually riding on this ticket, if not conclusive against him as a legal presumption, would at least be evidence that he assented to the terms indorsed upon the ticket, from which a jury would be authorized to imply such assent; and, as the circuit judge was not asked to submit any such question to the jury, I think the plaintiff is hardly at liberty to deny that there was, in fact, such an agreement as the defendants claim.

Assuming, then, that Perkins agreed to take "all the risks of accidents, and expressly agreed that the defendants should not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to his person"—for such are the terms of the ticket—the question remains, what is the extent and force of such agreement. Upon its face, it is clearly sufficiently comprehensive to embrace every description of accident, casualty or risk attending railroad travel. 'But it must obviously be subject to some limitation and qualification. It ought not to be considered as applying to such risks as could not have been within the intent and contemplation of the parties, and cannot apply to such as are not within the legitimate compass of contract upon principles of public policy.

The learned judge who tried this case at the circuit charged the jury that, "while, if the deceased was riding upon the pass, he was riding upon the conditions annexed to the pass, yet, notwithstanding the conditions thus particularly expressed, if the negligence of the defendants was gross and culpable; if it was of such a character that it would subject the party to a prosecution for fraud or crime; then it does not come within these conditions." In other words, that, if the ticket is in its nature a contract, the parties to the contract did not contemplate such cases of negligence as are fraudulent or criminal in their character.

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The rule of exception from the apparent scope and purview of the contract, asserted in this part of the charge, I think cannot be sustained. It states that fraudulent and criminal negligence is not within the scope of the contract. This would clearly be so, if the defendant were a natural person, and was stipulating in respect merely to his personal acts. And if it were not so, fraud vitiates all contracts; and no person will be allowed to stipulate for crime. If the defendants were private persons, who could commit crime and could be indicted and convicted under the statute of murder or manslaughter for killing Mr. Perkins, most certainly such crime would not be within the purview of this contract.

It is quite clear that Mr. Perkins never intended to agree, or the defendants to stipulate, that they, by their servants or agents, might kill him. Such was not the bargain. No one will pretend that the right to commit murder or suicide could be embraced in this or any contract. Like all other agreements, this contract must be construed in the light of the existing facts and circumstances at the time it was made, and not derive its construction from subsequent events. Parties, in making a contract, must be held to contemplate all the ordinary and possible incidents, accidents or contingencies which may attend its execution; and such accidents and contingencies must be deemed within the purview of the contract, not as accidents expected, but as accidents possible.

What, then, did these parties mean by this contract? The cardinal rule of interpretation is, what was the intent of the contracting parties at the time of making the contract? In the light of this rule, what are the facts? Perkins applied to the defendants' director for a free pass. A free pass means, the privilege of riding over the defendants' railroad without payment of the customary fare. The defendants are a railroad corporation, exercising the rights and subject to the responsibilities of common carriers, and liable, in a civil action, in this capacity, for all injuries to persons or property transported by them resulting from the negligence or unskillfulness of their agents or servants. The business of the defendants is all

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necessarily performed by agents and servants, and the defendants are necessarily obliged to employ a large number of persons as such agents and servants, some of whom will be more or less careless or negligent, notwithstanding and in despite of the utmost care, diligence and caution in their employment. The defendants are transporting persons and passengers by the powerful agency of steam; and when accidents did occur, they were liable to be attended, more or less, with very serious consequences. This the parties both well knew, and they also well knew that railroad accidents were of frequent occurrence; that railroad travel was subject constantly to perils resulting from the carelessness and negligence of engineers, conductors, baggagemen, brakemen, switch-tenders, and others; that trains were frequently thrown off the track or came in collision, and were subject to a variety of accidents and casualties against which no human prudence or skill in the employment of agents could entirely guard; and that all such accidents involve unavoidably, more or less, loss of life or limb or bodily injury, and other disastrous consequences. With perfect knowledge of these facts, Mr. Perkins asked for and accepted the free pass, upon the express condition that he should "assume all risk of accidents" and expressly agreed "that the Company shall not be liable under any circumstances, whether by the negligence of the defendants' agents or otherwise, for any injury to the person," &c. Such is the bargain. It can mean nothing else than that Perkins will take for himself the risk of all accidents and injuries to his person attending his contemplated trip in the defendants' cars from Rochester to Albany, so far as such accidents and injuries might result from the negligence of the defendants' agents and servants. The defendants, in view of the accidents, attended with much pecuniary loss, resulting constantly from the negligence of some of their agents, proposed to carry Mr. Perkins without charge to Albany upon condition that he would take for himself the risks attending the trip.

The question between the parties was simply which should take the risk of such accidents as might occur in consequence

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of the negligence of some of the defendants' many agents. Without an agreement exempting and absolving them from all liability in respect to such accidents, and the injuries resulting therefrom, the defendants would be legally responsible for such injuries. Mr. Perkins assumes the risk for himself. He becomes his own insurer. He absolves the defendants in advance from all liability "for any injury to his person" from such negligence. It was a fair insurable risk, and Perkins agreed to assume it for himself. If this be the contract, upon what principle it can be claimed that it does not embrace the accidents which may result from the gross negligence of the defendants' agents, I cannot conceive. The contract makes no exception in respect to degree of negligence. It embraces all degrees. It uses the term negligence in its general generic sense. To hold that it does not embrace gross negligence is to interpolate into it a qualification not made by the parties, and which tends materially to impair and nullify its force, for the parties well knew that accidents were liable to result from the gross negligence of defendants' agents, as well as from inferior negligence. The contract related to the acts of third persons, acting as agents, of the defendants. Perkins agreed to take his risk in respect to the negligence of such third persons. He took it entirely. If the agents were guilty of criminal negligence, which is only another name for gross negligence when it causes death or injury to life or limb, the agent himself is punishable criminally for such negligence. The principal never could be so punished. His civil responsibility therefore is discharged by the contract. There is no reason why the defendants should be responsible for the gross negligence of their agents, more than for slight negligence. To the principle asserted in the charge, I have tacitly assented in two cases, in *Bissel v. The New York Central Railroad Company* (29 Barb., 602), and in this case at general term which follows, and was decided upon the authority of that case. But I am satisfied upon reflection that it is essentially unsound.

The portion of the charge referred to, may perhaps embrace a denial of the right of the defendants to relieve themselves

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by contract from liability, for the gross negligence of their agents. The charge impliedly admits that the contract was valid as a protection to the defendants as against all accidents resulting from the degrees of negligence, below gross negligence.

A party who claims exemption from liability, for the negligence of his servants or agents, must undoubtedly base his claim upon the express words of his contract. It will not be presumed in his favor. In the case of *The New Jersey Steam Navigation Company v. The Merchants' Bank* (6 How. U. S., 388), the contract did not embrace, in terms, the negligence of the defendant's agents, and the court held, that it could not be regarded as stipulating for such negligence. Judge NELSON, who gave the opinion of the majority of the court, says:—"If it is competent at all, for a carrier to stipulate, for the gross negligence of himself, and his servants or agents, in the transportation of goods, it should be required to be done, at least in terms that could leave no doubt as to the meaning of the parties."

The case of *Wells v. Same Defendant* (in 4 Seld.), holds the doctrine, that negligence may be stipulated against, in respect to agents, but will not be deemed included in general words of exception, unless expressly mentioned. Judge GARDINER, says: "A man may contract against fraud or felony committed by those in his employment." The words of the agreement in that case, upon which the question arose, were that the canal boat be taken in tow, &c., "*at the risk of the master and owners thereof.*" These words it was held, and was properly held, did not include gross negligence.

But where negligence, as in this case, is expressly mentioned and stipulated against in the contract, I think the claim to make an exemption, to the force and effect of the contract based upon a distinction in the degrees of negligence, unsound and untenable.

I think with Lord DENMAN, who, in *Hinton v. Dibbin* (2 Q. B., 661), said: It may well be doubted whether between gross negligence and negligence merely, any intelligible distinction

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exists. Judge CURTIS (in 16 How. U. S., 474), also says, it may be doubted whether the term "slight, ordinary and gross negligence, can be usefully applied in practice."

The difficulty of defining gross negligence, and the intrinsic uncertainty pertaining to the question as one of law, and the other impracticability of establishing any precise rule on the subject, renders it unsafe to base any legal decision on distinctions of the degrees of negligence. Certainly before cases are made to turn by the verdict of juries, upon any such distinction, the judges should be able to define, with some precision, what they mean by gross negligence, slight negligence and ordinary negligence. It will be seen on examining the many cases reported, where the question has arisen, that this has been found utterly impracticable by the judges, when called upon to instruct juries on the question, and also when called on to declare the law more carefully in bank.

Negligence is essentially always a question of fact, and every case depends necessarily upon its own particular circumstances. What is negligent in a given case, may easily be affirmed by a jury; but in what degree the negligence consists, in any scale of classification of degrees of negligence, is not so easily determined — will ordinarily be a matter of pure speculation and of no practical consequence.

Upon the ground taken in that part of the charge referred to, that, if the negligence of the defendants' agent, Evarts, was gross and culpable, it was not embraced within the contract, and the defendants were liable in this action for the consequences resulting from such negligence, the learned judge, I think, erred; and the verdict cannot be sustained.

SELDEN, Ch. J., DENIO, DAVIES, ALLEN and GOULD, Js., concurred in this conclusion; and the court ordered a new trial. SELDEN, Ch. J., referred, for the reasons of his judgment, to the following opinion, delivered by him in another case, argued at the same term, in which the court failed to agree, and a reargument was ordered:

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Selden, Ch. J. The statute upon which this action is founded makes the defendants liable, only in cases where they would have been liable "if death had not ensued." (Sess. Laws, 1847, ch. 450.) The question, therefore, is precisely the same as if the deceased had received an injury, from which he had recovered, and had himself brought an action for damages. At the time of the accident, which caused his death, he was traveling from Buffalo to Albany, in one of the defendants' cars attached to a cattle train, and had in charge two car-loads of cattle belonging to himself and another. The written agreement under which the cattle was transported, contained the following clause: "And it is further agreed, between the parties hereto, that the persons riding free to take charge of the stock, do so at their own risk of personal injury, *from whatever cause.*" The deceased also received, upon entering into the contract, a ticket headed "New York Central Railroad, cattle dealer's ticket, on passenger train," upon the back of which was indorsed the following: "The owner of stock receiving this ticket assumes all risk of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents, or otherwise, for any injury to the person or for any loss or injury to the stock of said owner, shipped by stock or freight trains."

As the deceased at the time of the accident was not upon the passenger but on the stock train, he is to be deemed perhaps as having been traveling under the written agreement, rather than upon the ticket. As however the delivery of the ticket was simultaneous with the execution of the agreement, and both related to the same transaction, either may be referred to, to aid in interpreting the other. I do not see, however, that the construction of both together would be in any respect different from that of either taken by itself.

The case presents two questions. We are called upon, first, to interpret the agreement, and to see what risks are embraced by its terms; secondly, to determine how far a railroad company, engaged in carrying passengers, may, by special contract, limit its liability for injuries resulting from the want of

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due care. Although the responsibility of carriers of passengers differs essentially from that of common carriers of goods, the latter being substantially insured against every loss not arising from inevitable accident, while the former are only liable for injuries resulting from negligence, there is nevertheless a strong resemblance between the two kinds of employment; and some light may be obtained in cases like the present, from the decisions in regard to carriers of goods.

The very high responsibilities of common carriers being imposed upon grounds of public policy, the courts, both in this country and in England, have shown some reluctance to permit those responsibilities to be limited by any agreement between the parties. Hence, upon all questions of construction arising upon such agreements, they have uniformly inclined to preserve as much of the original liability of the carrier as possible. Still, it is only when there is something vague, uncertain, or equivocal in the terms of the agreement, that this disposition has been manifested. Whenever the language is clear and explicit, they have never refused to interpret it according to its plain and literal import.

Thus, in the case of *Lyon v. Wells* (5 East, 428), where a carrier by water had given notice "that he would not be answerable for *any* damage unless occasioned by want of ordinary care in the master or crew of the vessel," the court said, that notwithstanding the words "any damage," it was absurd to suppose that the carrier meant to make himself responsible for the negligence of the master and crew, and not for his own personal negligence; and therefore held, that he was not exempt from liability for a loss arising from his not having provided a sufficient vessel. But in the case of *Chippendale v. The Lancashire and Yorkshire Railway Company* (7 Law & Eq. R., 395), where the terms upon which the defendants were to transport the plaintiff's cattle, were stated in a ticket as follows: "This ticket is given subject to the owners undertaking all risks of conveyance *whatever*, as the company will not be responsible for any injury or damage, *howsoever*, caused occurring to live stock of any description traveling upon the

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Lancashire and Yorkshire Railway, or in their vehicles;" it was held that the company was not liable for an injury to the cattle arising from a defective track. The question was, as to the construction of the contract. COLERIDGE, J., speaking of the case of *Lyon v. Wells*, *supra*, which had been cited, and which was also purely a case of construction, said: "The court reasoned from the particular exception in the case of want of ordinary care in the master and crew, that it must be intended that want of ordinary care in the owner was also excepted; and that it was a want of ordinary care on his part in not providing a proper vessel. Now, the words here do not leave us open to adopt any such ground of construction as in that case."

So, in the subsequent case of *Cur v. The Same Company* (14 Law & Eq. R., 340), where the plaintiff's horse, transported under an agreement identical in terms with that in the case of *Chippendale*, had been injured through the gross negligence of the defendants, and the question raised, was whether the agreement should be so construed as to exempt the defendants from liability for injuries arising from gross negligence, the court held that the company was not responsible. In reply to the argument of the plaintiff's counsel, PARKE, B., said: "we ought not to fritter away the meaning of contracts merely for the purpose of making men careful."

The terms of the contract in the present case are, I think, equivalent to those used in these two English cases. The persons traveling upon the train to take charge of the stock, were to do so "at their own risk of personal injury from whatever cause." Our language affords no words more comprehensive than these. Every possible injury to the person is clearly embraced in the terms used, and there is nothing in the other portions of the contract, as there was in the case of *Lyon v. Wells*, to render it improbable that the parties intended to give to these terms their full signification. Where the language of a contract is clear and unequivocal, courts are bound to interpret it according to its plain and ordinary import. The ticket delivered at the time of the execution of

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the written agreement, to which if necessary we are at liberty to refer, presents no obstacle to the construction of that agreement which I have suggested, but on the contrary strengthens and confirms it. Its terms are different, but equally comprehensive. I have no hesitation therefore, in holding, that the agreement in this case should be construed to exempt the company from every species of liability which the law will permit them to contract against, including injuries from negligence or fault of any kind, whether imputable to the company directly, or only through its subordinate agents.

Having thus disposed of the question of construction, it remains to inquire how far parties engaged in the business of transporting passengers, have a legal right to discharge themselves from responsibility for injuries to the persons of such passengers. There is clearly some limitation to this right. It will be generally conceded that an individual so engaged cannot by any agreement, exempt himself from liability for any injury resulting from any willful or wanton misconduct of his own. That a party should be permitted to contract, that he may with impunity inflict wanton injury upon others, is repugnant to every sentiment of justice and propriety. No one seems ever to have contended for such a proposition, and hence there are no decisions upon the point; although law writers and judges have incidentally expressed their opinions in regard to it. Sir William Jones speaking of the obligations of a bailee, says: "As an agreement that a man may safely be dishonest, is repugnant to decency and morality, and as no man shall be presumed to bind himself against irresistible force, it is a just rule that every bailee is responsible for *fraud*, even though the contrary be stipulated." (Jones on Bail., 11.)

Judge STORY also lays down the same rule. He says: "In respect to cases of loss by fraud, there is a salutary principle, belonging both to our own law and the civil law. It is: that the bailee can never protect himself against responsibility for losses occasioned by *his own fraud*; nay, not even by a contract with the bailee that he shall not be responsible for such losses. For the law will not tolerate such an indecency and

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immorality as that a man shall contract to be safely dishonest." The same principle is asserted by GARDINER, J., in *Wells v. The Steam Navigation Company* (4 Seld., 375), and by WELLES, J., in *Parsons v. Monteath* (18 Barb. S. C. R., 353). It is not confined to common carriers and other bailees, but from its nature must be general in its application.

But the question arises, how far does the principle extend. Are parties precluded from protecting themselves by contract from the consequences of their own negligence, or want of care? This, certainly, cannot be claimed as a general rule in respect to every degree of negligence. The restriction is limited in the passages quoted from Jones and Story to the frauds of the bailee. This corresponds with the principles applied to policies of insurance against fire. Although the terms of such policies are frequently general, embracing every loss by fire, from whatever cause, still, if the loss was produced by the fraud of the insured the other party is not liable. It is otherwise, however, when the loss occurs from negligence even of the insured himself, provided the terms of the policy are such as clearly to embrace such a loss. In the case of *Catlin v. The Springfield Insurance Company* (1 Sumn., 434), the policy bound the company to make good any loss or damage "by fire originating in any cause, except design in the insured," &c. Judge STORY held that the company was liable for the loss which had occurred, although it appeared that the insured had himself negligently left the premises vacant, and that intruders had come in and burned them, but without his co-operation or knowledge.

So in the case of *Thurtell v. Beaumont* (1 Bing., 339), which also was an action upon a policy against loss by fire, the defence set up was that the plaintiff had willfully set fire to the premises, or had caused them to be set fire to. The judge charged the jury that to sustain the defence, the crime of willfully setting fire to the premises must be brought home to the plaintiff by evidence that would warrant them in finding him guilty of that offence; of course holding that showing that the fire was caused by the negligence of the plaintiff was no defence; and on motion for a new trial this charge was

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sustained. These cases show that there is no general rule which prohibits a party from contending for immunity from the consequences of his own negligence.

It does not follow, however, that such contracts can be made to cover every species of negligence of which the contending party may himself be guilty. There is a degree of recklessness which can scarcely be distinguished from a wanton or willful disregard of duty. It is equally reprehensible, and its consequences are in general held to be the same. It is to this degree of negligence that I understand Judge WELLES as referring, in *Parsons v. Monteath, supra*, when he says, "A contract which should excuse the carrier from liability for damage or loss arising from his own fraud or gross negligence would not be enforced." The same idea is suggested by Judge STORY in *Callin v. The Springfield Insurance Company*, already referred to, where he says, "I do not say that the defendants would be liable for every loss occasioned by the gross personal negligence of the plaintiff, for it might, under circumstances, amount to a fraudulent loss."

The principle therefore is, that parties cannot contract that they themselves may with impunity be guilty of willful misconduct, or of that degree of recklessness which is its equivalent. To this extent, no doubt, carriers of passengers are precluded from absolving themselves by contract from their responsibilities. But the rule has no application to contracts exempting them from liability for the acts of third persons. There is some difficulty in applying these principles to railroad companies on account of the artificial nature of corporations. As they can act only through agents, it may with about equal plausibility be said, on the one hand, that every act of their authorized agents, and on the other, that no such act is to be regarded as a direct act of the corporation. But a distinction is no doubt to be made, between the directors or managing officers of a corporation and its subordinate agents. As the former exercise all the powers of the corporation and are its only direct medium of communication with outside parties, they must, in respect to all its external relations, be considered

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as identical with the corporation itself. No contract, therefore, can exempt a railroad company from liability for the willful or wanton misconduct or gross recklessness of its directors; but the rule extends to no other officer or agent of the company.

The supreme court seems to have supposed, that the verdict in this case, could be sustained upon the ground that the negligence which resulted in the death of Bissell, was to be attributed to the directors of the company, and was of such a degree, that the company could not protect itself from liability for its consequences by any contract. But it is evidently impossible to sustain the judgment upon that ground: because the jury was not required to pass upon the case in that aspect. The judge charged the jury, in substance, that if they were satisfied the death of Bissell was caused by gross negligence of the defendants, or their switch-tender, the plaintiff was entitled to a verdict, and to this the plaintiff's counsel excepted. It is impossible to sustain this charge, upon the basis of the particular rule under consideration, for two reasons—First, the terms 'gross negligence' admit of great latitude of application, and do not alone adequately describe that degree of negligence which is necessary to bring the case within the rule in question. The negligence must be of that kind which is equivalent to a willful or wanton neglect of duty, and so the jury should in such cases be instructed; and secondly, no degree of negligence on the part of the switchtender would make a case for the application of the rule. It follows that the judgment in this case cannot be sustained upon the mere ground that parties are not permitted to protect themselves by contract from liability for their own personal misconduct.

But other grounds are taken which it is necessary to consider. The counsel for the respondent very justly likens this case to that of a common carrier of goods, and seems to think it not entirely settled that such carriers can by contract limit their common-law liability; or at least can exempt themselves from liability for the gross negligence of their servants or agents. This question, however, is too clear to require discussion. It has long been settled in England, that common

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carriers may by special contract regulate and control the extent of their responsibility. (Story on Bail, § 549; Angell on Carriers, § 220, *et seq.*) There can be no doubt that this right in England is held to extend to every degree of negligence however gross, and, as I apprehend, even to the fraudulent or willful misconduct of the servant or agent of the carrier. (*Lessen v. Holt*, 1 Stark., 186.) In this case which was an action against common carriers for negligence, in which the defence set up was, that there was a special contract exempting the carrier from liability, Lord ELLENBOROUGH said, "Under the terms of the present notice, if a servant of the carriers had in the most *willful and wanton manner destroyed* the furniture entrusted to them, the principals would not have been liable." That this is the rule in England there is no doubt. There are now various statutes on the subject in that country, commencing with that of 1 Geo. IV, but none which impair the force of this rule of the common law. In this state it was held in one or two cases, that common carriers were precluded upon grounds of public policy from limiting their responsibility by special contract. But these cases have been overruled, and the doctrine of the English courts is now the doctrine of this court. (*Wells v. Steam Navigation Co.*, 4 Seld., 375; *Dorr v. New Jersey Steam Navigation Co.*, 1 Kern., 485.)

Conceding, however, that common carriers of goods, may by special contract protect themselves from liability for the gross negligence or even frauds of their servants or agents, it is nevertheless contended that carriers of passengers cannot, by any contract, avoid responsibility for the negligence of their servants, when such negligence amounts to a crime. Our statutes provide "that every man who, by his culpable negligence causes the death of another, although without intent to kill, is guilty of manslaughter."

This position appears to involve some confusion of ideas. What connection there is between the liability of the servant to punishment for his crime, and the liability of the master in a civil action for the consequences of his servant's negli-

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gence, it is difficult to perceive. For the crime, the servant alone is responsible. The master neither participates in his guilt, nor is in the least degree involved in responsibility for it. The imposition of punishment for the public offence, and the enforcement of liability for the private injury, do not rest upon the same reasons, and bear no relation whatever to each other; nor can the latter with propriety be in the slightest degree influenced by the former. The idea suggested seems to have for its basis a blending of the principle already considered, which prevents a person from exempting himself by contract from responsibility for his own personal fraud, and that which holds a master liable for the negligence or fraud of his servant. But what these two principles have to do with each other, it is impossible to perceive. There is no doubt, I think, that the true rule is that stated by GARDINER, J., in *Wells v. Steam Navigation Company*, *supra*, when he says: "Although the law will not suffer a man to claim immunity by contract against his own fraud, I know of no reason why this may not be done in reference to fraud or *felony* committed by those in his employment." It is impossible therefore to uphold this judgment upon the ground that the negligence of the switch-tender is made a crime by statute.

It is however suggested, although not made a point upon the argument, that, on account of the very serious consequences and great risk to life which attends accidents upon railroads, public policy forbids that railroad companies should be permitted to exempt themselves by contract from those responsibilities for the safety of their passengers which the law devolves upon them.

This position calls upon the court to introduce a principle entirely new. It is not pretended that there is any precedent for such a rule. Passengers have been carried by stage-coaches for centuries without the application of any such restriction upon the natural right of individuals to take care of their own interests, and to provide for their own security. No such principle has ever been applied to transportation by vessels or by steamboats. It may be said that traveling by

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railroad is more hazardous than by other modes. Statistics would seem to prove the contrary: but this is immaterial. The question is, whether the principles of the common law which have always permitted men to manage their own affairs and to make their own contracts, provided they involve nothing immoral or illegal, are to be adhered to. Are the courts to interpose in a matter of mere private contract for the protection of individuals against the consequences of their own improvidence?

It may be urged that such contracts of exemption, if permitted, will tend to a relaxation of vigilance on the part of railroad companies, and that this affects the security of large numbers of persons, and is therefore a matter of public interest. But we have no reason to suppose that the practice ever has been carried to such an extent as to produce any appreciable effect in this way; and there is little danger that it ever will be. It is confined to the comparatively few cases in which persons travel gratuitously. If, however, it should ever prove productive of evil consequences, which I do not apprehend, it would, I think, be better to leave the remedy to the legislature than for the courts to break in upon the settled rules of law in respect to the right of individuals to bind themselves by contract. To establish the principle contended for would be an act of pure judicial legislation, and would, in my judgment, be an unwarrantable assumption of power. It would not be the mere application of a principle already established to a new class of cases — which is within the province of the courts, but the introduction of a new principle which has neither precedent nor analogy to support it. To this I am opposed. The judgment should, I think, be reversed, and there should be a new trial, with costs, to abide the event.

SMITH, J., in the Perkins case, was for affirmance, upon grounds thus stated by him:

SMITH, J. (*continuando* and dissenting.) The verdict in this case can, I think, be sustained, upon other grounds.

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Though the circuit judge presented the case to the jury as though the negligence of Evarts was not embraced in the contract, if gross and culpable, and that such negligence, if found by them, fixed the liability of the defendants, yet such negligence was discussed and considered in reference to the true point upon which, I think, the defendants' liability depended. The judge charged the jury that, "if they should find that negligence in the construction of the bridge, or in suffering it to remain in that condition, was gross and culpable in its character, amounting to a fraud or crime (meaning fraud or crime in Evarts), then the defendants were liable, notwithstanding the conditions of the pass." In this portion of the charge, the circuit judge presented substantially the true issue to the jury. Though this negligence was the immediate and personal fault or crime of Evarts, the trackmaster, still it was, in contemplation of law, the negligence of his principals, the defendants, as the proprietors of the road.

The common carrier always guarantees the safety of the vehicle in which the passenger is transported. The law implies a contract, in all cases, on the part of the carrier, that the vessel, or coach, or vehicle, whatever it may be, is sufficient for the business in which it is employed. (*Camden Co. v. Burke*, 18 Wend., 828; 5 East., 428; Story on Bail, §§ 508, 592.) The railroad is part of the machinery for the carriage of passengers, as much as the stage-coach or ship. (*Curtis v. Rochester and Syracuse R. R. Co.*, 18 N. Y., 536.) The negligence of Evarts in constructing the bridge over the Sauquoit of unsound, unsafe and improper materials, and the suffering of such bridge, thus negligently constructed, to remain in use, was the negligence of the defendants, as owners and proprietors of the railroad, and was a breach of this implied warranty.

This implied warranty is not embraced within the terms, scope, or intent of the contract or agreement made with Mr. Perkins, indorsed on the pass received by him. It is like the warranty of title, never necessarily embraced in terms in the contract of sale of goods or in the warranty of their sound-

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ness, goodness or other qualities. As well might a man, who was selling property not his own, reserve the right to cheat the vendee in such sale, as for a carrier to reserve the right to keep his road unsafe or to send the passenger by an unsafe conveyance.

The defendants are carriers of persons and passengers over their own railroad by the powerful agency of steam. They are bound to construct their railroad track with all possible care, and are bound to keep it in a safe and proper condition. They are bound to exercise the utmost skill and care in the preparation and management of their road, and of all the means of conveyance used thereon. The defendants, as common carriers of passengers, impliedly warrant and guarantee to every person who gets into one of their cars to be transported over their road, or any point or part thereof, that such road is land-worthy, that its track, bridges and all its structures are made and constructed in the most skillful manner and of suitable and proper materials, and are, in all respects, kept and maintained in a sound and safe condition, that their locomotives and cars and all their appurtenances are constructed with the utmost care and skill and are kept in sound and proper order, and also, that they have provided for the care and management of the trains on their said road, careful, skillful, competent and sober engineers, conductors, switch-tenders, and all other necessary agents. (Story on Bail, § 598; *Curtis v. Rochester and Syracuse R. R. Co.*, 18 N. Y., 537; Angell on Carrier, §§ 78, 838; *Hegetman v. Western R. R. Co.*, 8 Kern., 22.) But if the contract had contained an express exemption to the defendants from all responsibility by reason of the unsafe condition of their road and its bridges, locomotives and cars, such contract would be utterly void as against public policy. It would fall within the condemnation of the rule that no one shall stipulate for his own fraud or personal negligence.

The negligence, therefore, which the jury have found in respect to the construction and maintenance of said bridge was, in fact and legal effect, the negligence of the defendants as principals and proprietors of said railroad, and for which

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the judge properly held that they were liable. The verdict was therefore right, upon this discrimination between the negligence of the principal and that of the agents, and the real issue, upon which the defendants' liability depends, was necessarily and fairly tried.

The contract in this case, I think, is limited to that class of agents concerned in running and taking care of the train which carried the deceased, embracing the conductor, engineer and ordinary attendants of a train, such as brakemen, baggage-men and switch-tenders, whose duty it was to watch for such trains.

The distinction I make between those acts of negligence which should be deemed the negligence of the principal and that of the agent, is recognized in numerous cases. It applies particularly in that class of cases where the principal has been held liable to one agent for the negligence of another agent of a common superior. In such cases it is quite generally conceded that the principal will be liable if he employs an unskillful or incompetent agent in any department of his business, or uses defective or improper machinery. This court so held in the case of *Keegan v. The Western Railroad Company*; (and see 6 Barb., 243; Story on Agency, § 321; *Farwell v. R. & W. R. R. Co.*, 4 Metc., 49; *Coon v. Syracuse R. R. Co.*, 1 Seld., 495.)

When the principal is a natural person, the distinction between the acts of the principal and those of the agent is quite apparent and universally recognized. The difficulty in cases like the present arises from the fact that the defendant is a corporation, and all its operations are necessarily carried on through the personal instrumentality of numerous agents, exercising different offices and performing different and distinct functions and duties. But this circumstance should not give the defendants any rights or immunities in the transactions of business superior to those possessed by natural persons. Courts must look behind the artificial body which their charter creates, to the real principals—the stockholders of the defendants' corporation. They run the defendants' railroad,

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and carry on, thereon and therewith, the business of carriers of persons and property. They have a corporate name, in which they contract, and by which they sue and in which they are sued; but, aside from the privileges conferred by their charter, they are really liable in such corporate name, through their property invested in its stock and employed in its business, to the same extent as if they were members of a joint-stock company, or simply partners. The rule of their liability and responsibility in the transaction of business in and through the corporate name they employ, is precisely the same which would attach to them as natural persons. If a single person run the defendants' railroad, or many persons in the character of copartners, the single owner or each of the partners would be responsible as a principal for all its liabilities for negligence or otherwise, and could not exempt himself by contract from such liability, except for acts of subordinate agents. The officers and all the superior class of agents who direct and control the operations of the defendants' railroad; who set the machine in motion; who employ its numerous engineers, conductors and other agents; who purchase its locomotives and cars, and direct the construction and repair of its road, bridges and other structures; all, I conceive, stand in the place of the corporation, as respects the public and third persons, precisely as though they were, respectively, members of a copartnership owning and controlling said railroad. This class of agents do the work of their principal, and their acts and negligences should be deemed those of the principal.

The contract, too, in this case, I think, was prospective, and related only to such negligence as might transpire in connection with the running of the particular train on which Mr. Perkins was to go. It did not embrace, I think, such past negligence as was involved in the construction of a railroad bridge some three or four years previously, or in the maintenance of such bridge.

For these reasons, I think, the judgment should be affirmed. But a majority of my brethren think otherwise, and are of the opinion that the case having been tried and disposed of at the

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circuit and at the general term upon different and erroneous principles, the verdict cannot be retained upon the views herein expressed, but the case should go back to the circuit for re-trial.

The judgment must, therefore, be reversed, and a new trial be granted, with costs, to abide the event.

Judgment reversed, and new trial ordered.

24	224
124	64
24	224
146	204

SMITH, Administrator of JOSEPH WARD, deceased, v. THE NEW YORK CENTRAL RAILROAD COMPANY.

It seems that the owner of cattle, transported for hire on a railroad, and who goes along in charge of them, under a contract that "the persons riding free to take charge of the stock do so at their own risk of personal injury from whatever cause," is not to be regarded as a gratuitous passenger. *Per WRIGHT, DENIO, and DAVIES, Jc.*

Whether, as to one who, in the manner stated, gives some consideration for being carried, a contract is valid which aims to exempt the carrier from liability for damages resulting from the negligence of his servants. *Quære.*

The owner of cattle traveling in charge of them, under such a contract, and paying no independent consideration for the conveyance of himself, was injured by the gross negligence of an agent of the carrier in using an unfit and dangerous car. The carrier was held liable by a divided court, four of the judges going on the ground that the contract for exemption from liability was void, as against public policy; and the fifth, that the negligence, as it respected the machinery of transportation, is imputable to the carrier himself.

APPEAL from the Supreme Court. Action, under the statute of 1847, for damages from the negligent killing of the plaintiff's intestate, while a passenger on the defendant's railroad. On the trial, these facts appeared: The deceased made a written contract with the defendant for the transportation, from Buffalo to Albany, of two car-loads of hogs, for \$67 per car. The contract recited that they were carried at a reduced rate, in consideration of the owner's assuming certain specified risks in respect to the safety of the hogs

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during the transit. It contained this clause: "It is further agreed that the said Ward is to load, tranship and unload said stock at his own risk; the said New York Central Railroad Company furnishing the necessary laborers to assist. And it is further agreed that the persons riding free to take charge of the stock do so at their own risk of personal injury from whatever cause." Ward went upon the train in charge of his hogs. He paid no fare for his own conveyance otherwise than as a consideration for carrying him may be found in the above contract. He was furnished with a drover ticket, passing him free over the road; the terms of which were not otherwise shown than by evidence of the printed form of such tickets then used by the corporation, viz: "Pass ———, in charge of cars of stock, on account of ———. Takes all the responsibility as to the injury of himself or stock."

At Rochester the car in which Ward and other drovers had ridden from Buffalo was taken from the train, and an old emigrant car, unsafe, by reason of having a flat wheel, was substituted; the attention of the conductor was called to its condition and unfitness. The train proceeded to Oriskany, where this car was thrown off the track, and Ward was killed. The judge charged the jury to find for the plaintiff, if the death of the intestate was caused by gross negligence on the part of the defendant's or its agents, without fault on his part. The plaintiff had a verdict. The defendant's exceptions were argued, in the first instance, at general term, in the third district, and judgment rendered for the plaintiff. The defendant appealed to this court.

Sidney T. Furchick, for the appellant.

John K. Porter, for the respondent.

WRIGHT, J. It is no longer an unsettled question in this State that a common carrier of property may, by special agreement, restrict his common-law liability. (*Dorr v. Steam Navigation Company*, 1 Kern., 485, and cases cited.) There are no

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controlling considerations of public policy against permitting such carrier to limit the liability which the law imposes on him, by express agreement with the owner of the property ; and as the public interests are not to be affected, there can be no valid objection to the parties changing their relation in a particular transaction, by special agreement, so that the carrier instead of being an insurer against all except the act of God and the public enemy, shall become, as to that transaction, an ordinary bailee and private carrier for him.

A carrier of persons is not deemed a common carrier, nor is he subjected by law to like obligations. He is not an insurer, or responsible for anything but his own negligence, and that of his agents and servants. But in respect to this, he is held to a stringent duty and accountability; and the degree of duty is obviously to be measured by the dangers which attend the carriage, and the control which the carrier lawfully exercises over both vehicles and roadway. A carrier of passengers, by coach, on a public highway would be accountable for the negligence of the person whom he places in charge of the vehicle, and his own also, if injury occurs from the unfitness or defectiveness of such vehicle. The measure of his duty is to provide competent and skillful drivers, and sufficient and road-worthy carriages. A carrier of passengers by railroad (such road being operated by the carrier) is responsible for the negligence of his agents and employees in charge of the vehicles and the roadway also, and his accountability extends not only to the conduct and management of the railroad, so far as relates to the transit, but also to the sufficiency of the vehicles and the road itself. When a railroad company is the carrier, the duty rests on such company, not only to provide safe vehicles, but a safe roadway; and in view of the dangers which attend railroad carriage, its duty is not limited to such precautions as it is apparent, after an accident, might have prevented the injury, but such as would be dictated by the utmost care and prudence of a very cautious person before the accident, and without knowledge that it was about to occur. It is plain, as was said by JOHNSON, Ch. J., in *Bowen v. New York*

Central Railroad Company (18 N. Y., 408), that the utmost foresight as to possible dangers, and the utmost prudence in guarding against them, are the only limits which a decent regard to the safety of men, and a conformity to the established principles of the law, allow to be fixed to the responsibility of those who conduct and manage railroads. As to them, unless this degree of foresight and prudence be exerted, the presumption of negligence arises, and they will be responsible.

I am not aware of, nor have we been referred to, any case holding that a carrier of passengers by railroad may lawfully contract with a person offering to be carried against the consequences which the law attaches to his negligence, nor that the present defendants who are constituted by statute carriers of passengers, absolutely required to transport them, empowered to regulate the time and manner in which they shall be transported, and made liable for any damages occasioned by their neglect of duty, may contract to relieve themselves from this liability, or to assume any other character than that given to them by the statute. (Laws of 1850, chap. 140, § 1, pp. 28, 86.) Or to state the case differently, being authorized and compelled by law to carry persons on their road, and made liable for neglect of duty, both by statute and common law, they may by agreement with the passenger exempt themselves from the performance of duties imposed or required by the law for the safety of the citizen. Nay, that they may contract to relieve themselves from any degree of negligence or culpable omission of duty. In the present case the charge of the judge in its entire scope and meaning was, that the plaintiff could not recover unless the death of his intestate was the result of gross or culpable negligence of the defendants; yet this is claimed to have been erroneous, because such intestate had specially stipulated with the company to assume all risks of the transit, whether occurring from their culpable negligence and misconduct, or otherwise. In short, that they had secured, by contract with the intestate, a sort of license or right, so far as respected him, to be negligent; and no matter, though the

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roadway and vehicles be defective and insufficient, and the carrier's employees criminally negligent, and from these causes he is injured, there is no remedy.

In March, 1855, the defendants were exercising the double employment of common carriers of property, and carriers of persons, by railroad between Buffalo and Albany. As carriers of property, by the common law, their liability was that of insurers against all except the act of God and the public enemies; and as carriers of persons they were responsible for the slightest neglect of themselves or their agents resulting in injury. In the latter capacity their duty extended to the exercise of the utmost foresight and prudence in anticipating and guarding against possible dangers arising from the imperfections of the road or the vehicles run on it; and they were not only responsible for their own neglect of duty in providing a sufficient roadway and carriages for safe transportation, but also for the negligence of those acting in their behalf, in the control and management of the road and the transportation. As carriers of property, Ward, the plaintiff's intestate, a drover residing in Ohio, engaged with them for the transportation from Buffalo to Albany, of five hundred, or two car-loads, of live hogs. A special agreement for their carriage was entered into, which, by its terms, restricted the common-law liability of the carrier in certain respects. Ward assumed the risks of injuries which the hogs, or either of them, might receive, in the transit, in consequence of any of them being wild, vicious, unruly, weak, escaping or maiming themselves or each other: or from delays: or in consequence of heat, suffocation or other ill effects of being crowded either upon the cars, or by the owner feeding the stock or otherwise. Also, all risk of loss or damage sustained by reason of any delay in the transportation, or from accidents that might happen in consequence of insecurity in the floor, frame or doors of the cars in which the hogs were to be transported, and from any risk attending the loading and unloading of the hogs, the company furnishing the necessary laborers to assist. Beyond these assumed risks, the carriers were in no way absolved from

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their common-law obligation to safely transport and deliver such property to the owner at the point of destination. If any loss or damage occurred from injury to the hogs, from causes not embraced in risks assumed by the owner, the carriers were bound by their common law obligations. There is no pretense that the owner assumed all risks, and that by express agreement of the parties, the relation of the carrier as to the particular transaction was changed from that of a common carrier to an ordinary bailee, and from a public to a private carrier for hire. All that can be said is, that the legal effect of the agreement was to exonerate the carriers from risks attending the transportation and delivery, that as common carriers, and in the absence of any agreement, they were subjected to by law. No question, however, arises in this case as to the safe transportation and delivery of the hogs, or as to any liability of the company in respect to the carriage of the property.

As the owner was to feed and see to the condition of the hogs during the transit, and the carriers were to be relieved from the duty of taking care of them, the agreement contemplated that a person or persons on behalf of such owner should accompany the train to discharge the duty, but the sum paid to the carriers was evidently intended as a compensation both for the transportation of the hogs and the passage of the persons in whose charge, for certain purposes, they were to be. In no just sense could these persons be regarded as gratuitous passengers; and although the carriers assume to treat them as riding free, they were not; as it was a condition of the contract that they were to ride with the train to take care of the stock, and the consideration paid to the defendants was as well for such passage as for the carriage of the property itself.

The agreement, therefore, related to the transportation of property, and its whole intent and effect were to absolve the defendants as common carriers from certain specified risks that were otherwise imposed on them by law. In the instrument, however, is found this clause: "And it is further agreed between the parties hereto, that the persons riding free to take charge of the stock, do so at their own risk of personal injury

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from whatever cause." Ward, the owner, was the person riding on the stock train, of which his two car-loads of hogs formed a part, and he was killed during the transit, as the jury found, through the culpable neglect of the defendants in providing and using an insufficient and unsafe car for him and other passengers to ride in. On the trial, the defendants took the broad ground that this was a valid and binding agreement, and operated to excuse them from any liability for personal injury, or, at least, except such injury arose from willful misconduct. The judge, however, who tried the cause construed the agreement differently; and instructed the jury that if they should find that the death of the intestate was caused by gross negligence on the part of the defendants, without fault on his part, they were liable notwithstanding the agreement. The judge was not requested to define what he meant by the term "gross negligence," in its application to the case; but if the theory of the plaintiff as to the cause of the injury was the correct one (and that question was fairly submitted to the jury), within all the cases, the defendants were grossly and culpably negligent. A railroad company that shall neglect to provide safe and road-worthy vehicles for the transportation of persons, when the omission to do so is fraught with imminent danger to human life, and injury occurs thereby, is not only culpably negligent, but, I think, practises a fraud upon, and exhibits bad faith in respect to those whom they have undertaken to carry.

The accident resulted (as the jury must have found) from the use by the defendants of an unsafe and dangerous car, with a flattened wheel, which caused it to leave the track. Providing and using such a vehicle was the negligence of the carriers, culpable and inexcusable. It is in this case therefore quite unnecessary to inquire whether there is really anything practical in the definition of the degrees of negligence heretofore attempted by courts and text writers, or whether the carriers, being a corporation, may contract against liability for the negligence of its employees and servants.

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We come now to a consideration of the nature and effect of the stipulation in respect to personal injury of persons in charge of the stock introduced into the agreement for the transportation of the property. It is to be observed, that although the freight agent of the company testified that Ward was furnished with a pass, the form or tenor of it was not shown; and if the defendants have succeeded in limiting their liability as carriers of passengers, it is wholly by force of the stipulation above referred to: Ward himself being the person who went on the train to take care of the hogs.

Conceding for a moment that the defendants, as passenger carriers, might enter into a valid contract with a passenger to be absolved from liability for personal injury to him, the first inquiry that naturally arises is, whether this effect can be legally given to the agreement in this case, in exoneration of liability for injuries to Ward, the plaintiff's intestate, or whether really it has any binding force. The carriers and Ward agree, not that the latter shall assume all risks of personal injury, but that the persons who may ride on the train to take charge of the stock will do so. Now, suppose a person other than Ward should have accompanied the train to take care of the stock (and the agreement clearly contemplated such a case) and was injured by the carelessness of the defendants, it could scarcely be pretended that the company would not be liable. Such person would have made no agreement to assume any risk and because the carriers have agreed with another that he will ride at his own risk of personal injury, they cannot thereby avoid their legal responsibilities. It is in no sense his agreement, nor is he a party to it. If the agreement would have no binding force upon such a person, why upon Ward, who accidentally occupied his place? Can the agreement operate differently in respect to persons in the same class—binding one and having no force as to the other? Shall it be held to limit the carrier's liability as to Ward, and to have no effect in that direction as to another person occupying the same relation? Had the agreement been that Ward himself should ride on the train to take care of the stock, at his own risk of personal

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injury, from whatever cause, and such a contract was valid, a different question would be presented. But that is not this contract. Here the carriers and the owner of property contract for its transportation, and as parcel of the contract the owner is to take care of it on the transit, and to that end he must employ persons to accompany the train, and he stipulates that these persons shall ride at their own risk of personal injury. The owner may or may not be one of these persons, but if he should happen to be, have the carriers by force of the stipulation succeeded in relieving themselves from responsibility for an injury to him, resulting from their negligence? I think not. If carriers of persons by railroad are to be permitted to contract against liability for their own negligence, such contract should be at least directly with the contracting party, and clear and definite as to injuries to him. A contract between such carriers—who are simultaneously exercising the employment of common carriers of property—and the owner of property, that persons riding on the train in charge of such property, do so at their own risk of personal injury, is not of that character.

But if this be an incorrect view, and the contract is to be treated as one between Ward and the defendants, as carriers of persons in respect to injuries to him occurring in the transit, we are next to consider whether a carrier and passenger can make a valid contract that shall operate to excuse the former from all liability for personal injury to the latter; and if so whether the accident or negligence which caused the injury complained of was within the scope and spirit of the agreement actually made.

1. The defendants claim that this was a contract releasing them from all liability for personal injury to Ward, except such injury arose from their willful misconduct. But it is unnecessary to add this qualification, as by its terms all risks are assumed from whatever cause. Was such a contract a valid one? With regard to a special contract with a common carrier for the carriage of property, there are no considerations affecting the public interest or policy forbidding it being made. The parties to such a contract are alone interested; and al-

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though the carrier exercises a sort of public employment, the obligations which the law imposes on him inure exclusively to the benefit of the owner of the property. The owner may agree to relieve the carrier from his obligations as an insurer, and limit them as to the particular transaction to those of a private carrier for hire; and the interests of the public will be in no way affected thereby. But how is it when a railroad company is the carrier of persons, and engaged in the business of operating a railroad for the public use? Whether a contract shall be avoided on the ground of public policy, does not depend upon the question whether it is beneficial or otherwise to the contracting parties. Their personal interests have nothing to do with it; but the interests of the public are alone to be considered. The state is interested not only in the welfare, but in the safety of its citizens. To promote these ends is a leading object of government. Parties are left to make whatever contracts they please, provided no legal or moral obligation is thereby violated, or any public interest impaired; but when the effect or tendency of the contract is to impair such interest, it is contrary to public policy and void. Contracts in restraint of trade are void, because they interfere with the welfare and convenience of the state; yet the state has a deeper interest in protecting the lives of its citizens. It has manifested this interest unmistakably in respect to those who travel by railroads. Her policy, and the uniform policy of the law has been, in regard for the safety of the citizen who has recourse to this dangerous mode of travel, upon a road and by agencies over which he has no control, to hold the carriers to the exercise of the utmost foresight even as to possible dangers, and the utmost prudence in guarding against them. This policy is dictated both by a desire to protect the citizen, and because the public is interested in his safety. Whether a carrier to whose exclusive charge the safety of a passenger has been committed, by his own culpable negligence and misconduct, shall put in jeopardy the life of such passenger, is a question affecting the public and not the party alone who is being carried. It is said that

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the passenger should be left to make whatever contract he pleases; but, in my judgment, the public having an interest in his safety, he has no right to absolve a railroad company to whom he commits his person from the discharge of those duties which the law has enjoined upon it in regard for the safety of men. Can a contract, therefore, which allows the carrier to omit all caution or vigilance, and is, in effect, a license to be culpably negligent to the extent of endangering the safety of the passenger, be sustained? I think not. Such a contract, it seems to me, manifestly conflicts with the settled policy of the State in regard to railroad carriage. Its effect, if sustained, would obviously enable the carrier to avoid the duties which the law enjoins in regard to the safety of men, encourage negligence and fraud, and take away the motive of self-interest on the part of such carrier, which is perhaps the only one adequate to secure the highest degree of caution and vigilance. A contract with these tendencies is, I think, contrary to public policy, even when no fare is paid.

In this case, however, Ward was not a gratuitous passenger. He had compensated the carriers not only for the transportation of his stock, but for the carriage of himself to take charge of it. He is to be regarded in the same light as a passenger who has paid a compensation for being carried. Whatever may be said, therefore, in respect to a person riding free in pursuance of an agreement to assume all risks, the direct question here, is, whether it is against the policy of our laws for a railroad company carrying a passenger for a compensation to contract with such passenger for exemption from liability for its negligence. That it is I cannot entertain a doubt. If, then, the agreement in this case is to be construed as releasing the defendants from all liability for personal injury to Ward from their own culpable negligence and misconduct, and absolving them from all responsibility for his safe carriage, it is void.

2. But, was that the tenor and effect of the agreement? The contract, in which the stipulation is found, related to the transportation of his hogs, and that contract provided that the owner should assume certain risks in respect thereto, and

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either accompany the train himself to take care of them, or furnish other persons to discharge that duty. With respect to the property, the company assumed to safely transport it and take upon themselves all risks of transportation except those specified. They were to furnish the means of transportation—provide the road, attendants, supervision, and motive power, and secure sufficient cars, except in the single respect to the floors, frames, and doors of such cars. As to these things, there was no attempt to limit their common-law liability as carriers of property, and for loss or damage occurring to the owner during such transportation from causes other than those, the risks of which he had assumed the liability as common carriers continued. They were responsible for any loss to the owner resulting from neglect to provide either a sufficient roadway or secure and road-worthy vehicles for the transportation, except as respected their floors, frames and doors. They were liable for any degree of negligence of themselves or their servants, in the transit, except as to those things which the owner undertook to relieve them from, and take upon himself the risk. This is the nature and effect of the contract as to the carriage of the property. But in it is embodied the stipulation that persons accompanying the train, to take charge of the stock, do so at their own risk of personal injury from whatever causes. It was a convenience to both parties, and a part of the contract, that a person should ride along to take care of the stock. Now we are asked to presume, whilst the agreement bound the carriers to safely transport the property, and the law held them responsible as insurers except so far as they had succeeded by agreement to limit such liability, that the parties intended that the persons in charge of the property should assume all risks of personal injury, whether resulting from the culpable negligence and misconduct of the carriers or otherwise: and that it was intended that the carriers should be held for loss occurring from their negligence in the transportation of the property, but absolved from all liability for injuries caused by such negligence, however gross or culpable, to the persons in charge of

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it. This could not have been the intention, nor will the law presume that it was, so long as there were other risks to which the stipulation might naturally and properly apply, and more consistently with honesty and fair dealing. It will not be presumed that Ward intended to hold the carriers for loss occasioned by their omission of care in the transportation of his property, but to excuse them from any liability for injury to himself whilst taking care of it, though having no control or management whatever of the railroad: nor that the carriers, after becoming a party to a contract for the carriage of live stock, a part of which contract was that a person should ride on the train to take care of such stock, intended that that person should take on himself the risk of personal injury, even though they should omit the ordinary precautions which a man observes in taking care of himself or his own property. The most reasonable construction to be given to the stipulation, in view of the circumstances under which it was made, and the only one, I think the law will permit, is this: the persons riding on the train to take care of the stock will do so at their own risk of personal injury from causes not produced by the willful misconduct, gross negligence, or want of ordinary care of the carriers or their servants, in the control and management of the railroad on which themselves and the stock were to be carried. Had Ward, in general terms, agreed to assume all risks as to the transportation of the stock, the carriers would still have been liable for gross negligence or a want of due care. The parties might by such agreement have succeeded in establishing the relation, as to this transaction, of an ordinary bailee and private carrier for hire. But a private carrier for hire is answerable for gross negligence or a want of due care. There are cases in respect to the transportation of property, giving a similar construction to stipulations as broad and comprehensive as the present one. In *Alexander v. Greens* (7 Hill, 538), the contract was to tow a canal boat to Albany, at the risk of the master and owners thereof. The canal boat was run upon a rock and her cargo lost; but it was held in the court of errors that the contract did not exempt the defendants from the con-

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sequences of their gross negligence or want of ordinary skill and care, and that that could not have been the intention of the parties. The case of *Wells v. The Steam Navigation Company* (4 Seld., 375), involved the same question and upon a precisely similar contract. Although contending that the defendants were only answerable for injuries occasioned by fraud or want of good faith, the court of appeals held that the contract did not protect the defendants from the gross negligence of their servants in navigating their vessel, and that a stipulation or a contract to exempt from gross negligence, must be specific and distinct, or it will not be implied from a clause containing a general expression that might naturally apply to other risks. In *Sager v. The Portsmouth Railroad Company* (1 Am. Railway Cases, 172), the question arose upon the liability of the carriers for the loss of live stock by an accident upon a railroad. The contract for the carriage was in the following form: "We take upon ourselves the risk of all and any damages that may happen to our horses, cattle, &c., and that we will not call upon said railroad company, or any of their agents, for any damages whatsoever;" yet it was held that this was not a stipulation for willful misconduct, gross negligence or want of ordinary care in the defendants or their servants, either in respect to the railway or its management. A similar conclusion was reached in the case of *The New Jersey Steam Navigation Company v. The Merchants' Bank* (8 How. U. S. R., 383), which was an action against a common carrier for the loss of the goods, when the clause on which the carrier relied for exemption was, "*at the risk of the master and owners.*"

On the whole, therefore, there was no error in holding at the circuit, that notwithstanding the stipulation, the defendants were liable for gross negligence. The instructions to the jury were, that if they came to the conclusion, from the evidence, that the death of Ward was caused by gross negligence on the part of the defendants, without fault on his part, their verdict should be for the plaintiff; otherwise they should find for the defendants. This was quite as favorable to the defendants as they were entitled to claim. The evidence in one view of it,

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in my judgment, would not only have justified a finding of gross negligence, but negligence of so culpable a character that had the carrier been a natural person and not a corporation, he would have been liable to a criminal prosecution.

The judgment of the supreme court should be affirmed.

DENIO and DAVIES, Js., were of opinion that there is no general public policy forbidding a contract by which a railroad corporation should be exempt from liability for the negligence of its agents in respect to a purely gratuitous passenger, but they thought that the railroad act and its policy prohibit a contract for such exemption with a paying passenger. They were for affirmance, on the ground that plaintiff's intestate was not a gratuitous passenger.

SMITH, J., was for affirmance on the ground that the negligence was that of the corporation itself. SUTHERLAND, J., for affirmance, upon the ground stated by him in *Wells v. The same Defendant*, that the contract for exemption was void irrespective of the question whether the transportation was gratuitous or for hire.

ALLEN, J. (dissenting.) The action by representatives of one whose death is caused by the wrongful act, neglect or default of another, is confined to cases in which the act, neglect or default causing the death is such as would (if death had not ensued) have entitled the party injured to maintain an action for damages in respect thereof. (Laws of 1847, ch. 450, p. 575, § 1.) Therefore it must be some act, neglect or default of which the deceased, had he survived, might have complained, and for which the defendants would have been liable to him. If, by reason of the relation of the parties, or for any other reason, the defendant owed no duty to the deceased, and was not bound to do or forbear to do any act in respect to the deceased, the doing or omission of which caused the injury, neither the deceased, at common law nor the representatives, under the statute, can maintain an

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action. The duty of the party to be charged must arise from contract or be imposed by law resulting from the relation of the parties, and if no duty exists resting upon one of these foundations, then there can be no act, neglect or default which would give the party injured or his representatives an action, although under other circumstances the same act or omission would constitute a breach of duty and charge the guilty party with the consequences. The act, neglect or default which gives the action, takes its character as actionable or not actionable under the statute, not alone from its intrinsic and abstract qualities, but from the relation of the parties implicated. Had there been no special contract qualifying the common-law liability of the defendants as carriers of persons and property, no question could have been made as to their liability in this action. They would have been bound to respond, not only for gross but for any the slightest neglect on the part of their servants and agents. Whatever doubt may have at one time existed on the subject, it is now well settled that bailees, common carriers and others may relieve themselves of liabilities resting upon them at common law by special contract with those interested, and for whose benefit and protection such liabilities have been deemed necessary. The common law, from motives of public policy and for the protection of the public, has made common carriers of property chargeable with all damage to, and loss of property in, their possession as carriers, except only where such damage or loss has arisen from inevitable accident, sometimes called "the act of God," or the public enemies. Carriers of persons have, for similar reasons, been subjected to very stringent liability, and are held to the highest degree of care and skill, and made liable for the slightest neglect. Indeed, so exacting is the law, although founded on the wisest of reasons, that the consequences of the liabilities of this class of public servants are in extreme cases almost penal in their nature. But those rules are established and take the place of a special contract, not for the benefit of the public, but for that class of the public who have to do with those classes and for the protection of those who may suffer

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by neglect of duty on their part; and unless there is some exception which is to operate in this class of cases which does not affect any other right or duty, or the relation of parties in other situations, the individual for whose benefit the liability exists, and the duty is imposed, may waive them by agreement. No principle is better settled than that a party to whom any benefit is secured by contract, by statute, or even by the Constitution, may waive such benefit, and the public are not interested in protecting him or benefiting him against his wishes. (Broom's Leg. Max., 309; *Lee v. Tillotson*, 24 Wend., 887; *People v. Murray*, 5 Hill, 468; *Donnelly v. Corbett*, 8 Seld., 500.) The public have no interest in the question, which of the two, A or B, shall take the risk of the seaworthiness of a ship, or the fitness of a railway carriage, or the care and faithfulness of a third person employed in the performance of a duty, in which either or both have an interest, although by certain general rules the law has declared that in the absence of any contract the risk shall be upon A and not upon B. But if B elects to relieve A, and to assume his risks and liabilities, the public are not at all concerned and have no occasion to forbid such contracts. If the contract is induced by fraud or duress, it is, of course, void, and the common-law liabilities of the parties will remain unchanged. The character of the liability which one contracting party assumes in relief of the other, cannot affect the validity of the contract, it being wholly personal to the parties. If one is unwise enough deliberately to excuse another from liability for gross and very gross neglect, there is no good reason why he should not be permitted to do so, even for personal neglect of that character: that is, there is no reason why the contracting party should not be estopped from setting up a claim against his express contract not to do so. If the public have any claim against the negligent party, either criminally or otherwise, it will not be affected by the contract, and if the contract be in violation of the law, or for the commission of a criminal offence, neither party can maintain an action against the other upon it or in respect to the transac-

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tions to which it relates. Such a contract will not be construed—except its terms compel such construction—as authorizing or contemplating a crime, or as providing against the consequences of a crime, and hence would not ordinarily be held to embrace acts of culpable negligence resulting in death under circumstances that would constitute manslaughter, that is, culpable negligence of that degree in the principal and the contracting party. But the reason does not extend to or prohibit a contract shifting the pecuniary liability of A, for the acts of C to B, although such acts of C might be such as would subject him to punishment for manslaughter, for causing death by his culpable negligence, or for any other offence. A man should not be permitted to contract for impunity from his own criminal acts, but there is no reason why he may not contract for such impunity from the acts of his agents, for whom and for whose acts he is only pecuniarily responsible, in the nature of a guarantor. A man may be lawfully insured against risks and liabilities of all kinds, and this amongst others. The liability of the principal for the acts of the agent is the same as, and no different from, any other pecuniary liability resulting from contract or the relation of the parties. There is no recognized public policy which requires an individual under all circumstances to bear or be responsible for the grossest negligence, or even the fraud, of his agents and servants. Unless he is specially exempted by statute or express agreement, the law for good reasons makes him so liable. The well-understood doctrine of *respondeat superior* furnishes the rule in such cases. But in fire policies the insured has indemnity against the negligence of his most confidential servants and agents, and in marine risks the undertaking of the underwriter may and does ordinarily include the fraudulent and barratrous acts of the master and mariners who are the employees and agents of the insured, notwithstanding the acts may constitute an offence made criminal by the laws of the land. (1 Story's Laws, 84; *Cook v. The Commercial Ins. Co.*, 11 J. R., 40.) "The modern cases go far to establish the rule that for the conduct of the master or mariners, in the practical

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navigation, care and management of the vessels after the commencement of the voyage, the insurers are responsible, provided the actual loss arise from one of the perils insured against, although such peril was occasioned or increased by the negligence, carelessness, bad seamanship or other misconduct of the master and mariners, not amounting to barratry." (Per SHAW, Ch. J., in *Copeland v. New England Marine Ins. Co.*, 2 Met., 440; *Dixon v. Saddler*, 5 M. & W., 405.) Baron PARKE, in the last case, says: "The great principle established by the more recent decisions is, that if the vessel, crew and equipments be originally sufficient, the assured has done all he contracted to do and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew." In this class of cases the law of *respondet superior*, adopted as an equitable and a reasonable rule in the absence of any contract, is suspended by the agreement of the parties, the courts only looking to ascertain what in truth the parties have as between themselves agreed, shall be the rule and measure of responsibility. Public policy does not interfere with the freedom of the parties to make such contract as their own interests may dictate, and if a party may lawfully procure another to indemnify him against personal loss, by insurance against the negligence and fraud of his own agents, *a fortiori* he may, by the deliberate agreement of a third person in respect to whom he stands in the relation of insurer for the acts of his servant under the doctrine of *respondet superior*, be relieved from that responsibility. The party may become his own insurer as he might have insured the principal.

Another class of cases establishes a principle utterly at war with the doctrine contended for, that public policy forbids a contract by which a principal may be discharged in advance from responsibility for the negligence of his servants, whatever the degree of negligence may be. I refer to the case of *Coon v. The Syracuse and Utica Railroad Company* (1 Seld., 492), and the cases in this and other states preceding and following it, which decide, that a principal is not liable to one of

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his agents or servants for injuries sustained through the negligence of another agent and servant, when both are engaged in the same general business. Chief Justice SHAW in *Farwell v. The Boston and Worcester Railroad Corporation* (4 Met., 49), lays down the general rule, "that he who engages in the employment of another for the performance of specified duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal presumption, the compensation is adjusted accordingly." If a contract may be implied from the relation of the parties, which shall thrust aside the common-law rule of *respondet superior*, there would seem to be no reason why it might not be put aside, by the voluntary and express agreement of those concerned. The question in all cases of special contract, is not what the law upon the ordinary principles which govern in the establishment or application of rules in the new and ever varying cases that constantly arise, would adjudge to be the reasonable and just duties and liabilities of the parties to each other, but what have the parties agreed in relation to their respective duties and liabilities. What relation have they, by the terms of their contract, established between themselves? The law only undertakes to do that for parties, when they omit to do it themselves, or rather the relation will be presumed to have been constituted in reference and subject to the ordinary and established rules governing such relation, when the parties are silent upon that subject. The attempt to regulate the right of parties to contract, by the shadowy and vague distinctions between the different degrees of negligence, and to hold that they may shift responsibilities for the consequences of ordinary neglect of third persons, but may not do so in respect of gross neglect of the same persons, is not satisfactory, for two reasons: 1st, it is not founded upon any principle, and 2d, it is not capable of any certain and satisfactory application to individual cases as they arise. Attempts have been made to fix a liability upon the distinction between gross negligence and negligence merely, but courts have been compelled to abandon the attempt, and to say that negligence

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does not change its character, and become anything but negligence, by the application of any epithet to it. The earlier cases have, so far as practicable, been reconciled with the more modern decisions, although all cannot be reconciled in this way, upon the ground that what was called in the earlier cases "gross negligence," was in fact actual misfeasance in the bailee. (*Hinton v. Dibbin*, 2 Q. B., 646; *Owen v. Burnett*, 2 Cr. & M., 358; *Wyld v. Pickford*, 8 M. & W., 443.) No definite meaning has yet been given to the term gross negligence, or any definition which will not leave the whole question to the discretion of the tribunal, that is to pass upon any particular case. The idea of distinguishing between gross negligence and negligence merely, as affecting the validity of contracts, of carriers and other bailees, had its origin in the supposed inviolability of the rule establishing the liability of those engaged in that branch of public employment. With the introduction and full establishment of the more reasonable rule, that the duties resulting from this employment, alike with every other employment, were the subject of special contract, this idea has gradually vanished: it is now entirely abandoned in England and has never been so firmly established anywhere as to have become an authoritative rule of decision. *Wyld v. Pickford*, *supra*, was an action against a carrier, and the question had respect to the limitation of the common-law liability by a notice, which in England is held to have the effect of a contract—an effect denied to it by the courts of this State—and the defendant was held liable for a misdelivery of the package. PARKE, B., in giving judgment, says, with some hesitation, "The weight of authority seems to be in favor of the doctrine, that in order to render a carrier liable after such notice, it is not necessary to prove a total abandonment of that character, or an act of willful misconduct, but that it is enough to prove an act of ordinary negligence, gross negligence in the sense in which it is understood in the last mentioned cases. (4 B. & Ald., 30, and 3 B. & B., 182.)" The case was decided in 1841. In *Shaw v. North Midland Railway Company*, 13 Q. B., the defendants were held not liable for an injury to a horse while

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being transported by the defendants, resulting from a defect in the car, which was pointed out to a servant of the company, and who undertook but failed to remedy it, under a declaration charging the company as common carriers upon their duty "safely and securely to carry the horses," &c. The horses had been received, and a ticket given for them with a memorandum thereon, that the ticket was issued "subject to the owner's undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage (however caused) occurring to horses or carriages while traveling or unloading." The court held, that the carrier was only liable upon and according to the terms of the contract, and did not become liable as carriers by reason of the negligence of the servants of the company. Lord DENMAN, Ch. J., says, "It may be, notwithstanding the terms of the contract, the plaintiff might have alleged that it was the duty of the defendants to have furnished proper and sufficient carriages, and that a loss happened from a breach of that duty." This would depend, of course, upon the true construction of the contract. Under a similar contract, the court held, in *Austin v. The Manchester, &c., Railway Company* (10 C. B., 454), that giving to the words of the contract their most limited meaning, they must apply to all risks of whatever kind, and however arising, to be encountered in the course of the journey; and, therefore, that the company were not responsible for injury done to a horse from the firing of a wheel, in consequence of the neglect of the servants of the company to grease it. CRESSWELL, J., delivered the opinion of the court, and remarked, that there was nothing in the declaration amounting to a charge of misfeasance or renunciation of the character in which the defendants received the goods, and after speaking of the risks assumed by the plaintiff, one of which was that of the wheel taking fire from a neglect to grease it, adds, "whether that is called negligence merely, or gross negligence, or culpable negligence, or whatever other epithet may be applied to it, we think it is within the exception from responsibility provided by the contract." The same principle is applied

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in *The York, Newcastle and Berwick Railway Company v. Crisp* (14 C. B., 527), where the damage was caused by delay in the forwarding of the cattle which were the subject of the contract; and in that case there was an express promise by the agent of the company to forward them at a particular time, no excuse was shown for the delay, and the receipt, which was the evidence of the contract, was given after dark, and not read by the party. In excusing the principal from liability for the negligence of his servants in acts occasioning injury to a fellow servant, no distinction is made in any of the cases between the degrees of negligence. For injuries to a servant traceable to the neglect of another servant as the proximate cause, the master is not liable, no matter how gross or culpable that neglect may be. (*Wigmore v. Jay*, 5 Exch. R., 358; *Albro v. Agawam Coal Company*, 6 Cush., 75; *Boldt v. New York Central Railroad Company*, 18 N. Y., 432; *Gillshannon v. Stoney Brook Railroad Company*, 10 Cush., 228; *Russell v. Hudson Railroad Company*, 17 N. Y., 134; *Priestly v. Fowler*, 3 M. & W., 1; *Cone v. Syracuse and Utica Railroad Company*, 1 Seld., 492.)

In the absence of fraud or other circumstance vitiating the contract, the parties may divide and share the risks of travel and transportation concerning which they contract, and deal with each other as they please. All that courts have to do is to interpret the contract and ascertain what risks come within its terms, and place them upon the party assuming them by the terms of the agreement. It is the intent and mind of the parties as declared by the contract that determines the liability for risks of the journey or of the carriage, and damages accruing in the performance of the contract. Perhaps it would require very explicit language to excuse a party from the consequences of his own fraudulent act or any willful or wanton neglect to provide ordinarily safe and suitable conveniences and means of transportation or travel, and fit and proper agents for the performance of the contract, such as the other party had a right to expect would be provided. In *Keegan v. The Western Railroad Corporation* (4 Seld., 175), this court, distin-

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guishing, not between negligence and gross negligence, but between the negligence of a servant and what was regarded as the actual fault or misconduct of the defendant, held the Company liable for using a defective and dangerous locomotive, by which one of its servants was injured. It may be, also, that, in the absence of an express provision in the contract to the contrary, a carrier of persons and property will be held to the duty of furnishing proper and reasonably safe carriages, at least such as are not known to be unsafe, and provide fit and suitable agents and such as are reputed faithful and trustworthy, as upon an implied contract to that effect—implied as a condition precedent to the agreement of the other party to the contract to take upon himself the risks of the travel and transportation proper. It might well be said that, in assuming the risks of the carriage, the traveler or owner of the property only had in his mind and intended to assume the proper risks of the transportation, and not to relieve the carrier from ordinary good faith in the performance of his duty. The most common risks in railroad traveling arise from the neglect of the engineers, conductors, switch-tenders and other subordinate agents in the progress of the journey; and such must be supposed to be in the mind of the parties when providing for risks by the contract. If these are excluded, the contract will be substantially unmeaning. They are the perils incident to that method of travel and transportation; and whether the neglect is such as may be called gross, in a servant upon every other occasion vigilant and faithful, cannot be material. That is one of the risks which attach to the running of every railroad train. Some person upon whom the safety of the train depends may fall asleep, become confused, be suddenly deprived of his reason, or purposely do some wicked act by which the train and all on board may be greatly periled and damaged, if not destroyed; and yet, as one of the contingencies and risks, it must be held to be in the minds of the parties and provided for in the compensation.

A statute exempting a carrier from liability in certain cases includes losses from gross negligence, as well as those arising

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from slight negligence. (*Hinton v. Dibbin*, 2 Q. B., 646.) And there is no reason why a statutory exemption should be more extensive than an exemption by contract in the same terms. There is no difficulty in interpreting the contract here. The deceased agreed that, on riding free (as he did), to take charge of his stock, he would do so at his own risk of personal injury "from whatever cause."

The contract is as comprehensive and worded in the very terms of that in *Austin v. Manchester Railway Company*, and *The York, &c., Railway Company v. Crisp* (*supra*), which was held to excuse the Companies from the consequences of the gross negligence of their agents. It is true that carriers of persons by land or water, by any of the ordinary means of travel and conveyance, are not common carriers, or, in any sense, bailees; but, in many respects, they are governed by the same rules, or rules of a like character, and having their foundation in the same general principles, and the analogies between the two classes of public servants are very strong. In respect to both, the law, in the absence of any express contract, fixes the terms of the contract and determines the relative rights and duties of the respective parties. There is no reason, growing out of the service to be performed, or anything connected with the contract or duty or the interests of the public, which should prohibit, in either class of contracts, an express provision varying and shifting the common-law rights, risks and responsibilities of the parties, as connected with and incident to the contract, and the performance of the duty growing out of the contract. This, of course, would not give countenance to the idea that a contract might be made authorizing or excusing a criminal act. Such a contract could not be enforced by either party.

As, in the case of common carriers of goods and other bailees, the common-law liability, established for good reasons and for the protection of the public, may be varied by express contract, the corresponding liabilities attaching to carriers of passengers by the same common law may well be subject to variation by the deliberate assent or agreement of the parties concerned.

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A criticism is made upon the contract in this case, and was adopted and sanctioned by the learned justice upon the trial. The provision in the contract is, that "the persons riding free to take charge of the stock, do so at their own risk," &c.; and it is said that the deceased was not riding free. The justice said to the jury that it was not strictly accurate to say that he was traveling under a free pass. In the view of a gratuity he was probably not traveling or riding free, that is, he was not riding without some equivalent, and that equivalent was the consideration growing out of the contract for the carriage of the cattle of the deceased. But he did not pay fare as a passenger, that is, he paid only for the carriage of his cattle, and nothing as a distinct consideration for his own carriage; and, in that sense, he was traveling or riding free. In that sense, the term "riding free" was used in the contract. He availed himself of that provision, and rode in the same train with his cattle, to take charge of them, without paying for his passage. He rode under a pass entitling him to the ride, by the terms of which he took "all the responsibility as to the injury of himself or the stock." The principles which should, in my judgment, govern this case, were decided by this court in *Perkins v. The Same Defendants*, at the present March term. The only distinction between the cases is, that, in the one cited, the deceased was riding upon a "free ticket," a pass, given without consideration and as a gratuity. The principle being conceded, that special contracts may be made by railroad companies, exonerating them from some or all of the ordinary risks of travel to passengers over their road, it would seem to follow that, in every case except where there was a simple understanding to carry for the fare allowed by law, or fixed by the company in pursuance of the authority of law, a company might contract with the traveler for such division of the risks as should be agreed upon. What should be a sufficient consideration for the agreement of the traveler to assume the risks, would be for him to determine. The courts would not assume his guardianship, and pass upon the adequacy or sufficiency of the consideration. The law, perhaps, would not tolerate

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the imposition of a ticket upon a passenger, paying the usual full fare, which would, by its terms, release the company from any of its ordinary common-law liabilities. But where a special contract, a contract out of the usual and ordinary course of things is made, and for a consideration other than that of the usual and ordinary fare for the carriage of passengers, the liabilities may be regulated by that contract. Whether the consideration upon and for which the traveler takes upon himself, in discharge of the company, certain risks, is the whole fare, or half fare, or any outside and independent consideration, is not material. It is enough that a special contract is made, upon a consideration which the parties have agreed to be adequate. Most certainly, the courts will not, in an action upon a policy of insurance, inquire into the sufficiency or adequacy of the premium as a consideration for the risks assumed. The deceased here agreed, in consideration that the defendants would take his stock at a given rate for transportation, and permit him to ride over the road without additional charge to take charge of the stock, that he would assume and bear all the risks of the journey; and who shall sit in judgment upon this contract, and say it was without consideration, or that the consideration was unlawful, or that the contract was against public policy? As said before, the decision in *Perkins v. The New York Central Railroad Company* is decisive of this case. Had the case been put to the jury solely upon the question whether the defendants, in the carriage of the deceased, made use of a car unfit and unsafe for the purpose, and known by the managers of the Company to be unfit and unsafe, a different question would arise, and one which, as it cannot be now decided, I do not care to discuss. Its consideration would involve a critical and careful examination of the doctrine of corporate responsibility as connected with the acts of its directors or its principal and general managers, as distinguished from the acts of servants and agents in a subordinate capacity and subject to the control and direction of the superior or general officers and managers of the corporation. It is sufficient that, in this case, the learned justice, in charging

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the jury, distinguished between mere negligence and "wrongful or culpable negligence" on the part of the defendants and their agents; holding them excusable from the consequences of the former, but not of the latter, and that, if the contract was so construed as to include "wrongful and culpable negligence" of the defendants or their agents, it was "void as against public policy, and, either way, the agreement was no bar to the action." There was nothing in the charge to qualify this proposition; and this is clearly erroneous within the case of *Perkins v. The New York Central Railroad Company*. So long as the negligent or wrongful act is that of a servant or agent, there can be no doubt, I think, that the Company may contract for relief from liability for it; but the charge was to the contrary of this proposition. The use of the cars with a flattened wheel is alluded to in another part of the charge, and the use of it was charged to be great negligence, especially after its danger had been pointed out to the defendants' employees; and the jury were told, "they would probably have little difficulty in finding that the use of such a car in the transportation of passengers was a reckless exposure of life, amounting to gross negligence." And, for gross negligence of their servants and employees, the defendants were held responsible at the circuit, not on the ground that the furnishing a proper and suitable car was an implied condition of the contract by the deceased to assume the risks of the journey, or the omission to furnish such car a breach of good faith which released the deceased from his undertaking, but on the ground that gross negligence, even of the lowest and most subordinate employee of the Company was not within the contract, or, if within its terms, the contract was void. This position is directly overthrown by *Perkins' case*, cited above, and by *Shaw v. North Midland Railway Company (supra)*. The cause was submitted to the jury upon this erroneous theory, and the whole tenor of the charge was wrong, and tended to mislead; and, as the exceptions reach the objectionable parts, the error cannot be overlooked.

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The cases which are somewhat in point, as involving principles to some extent analogous, are not in conflict with the conclusions to which I have come, but, on the contrary, will, I think, be found on careful examination to justify and bear me out in the result which I have indicated. In *New Jersey Steam Navigation Company v. Merchants' Bank* (6 How. U. S., 344), Judge NELSON, while deferring to what seemed to be the leaning of the New York cases, and of the English cases up to that time, yet, in effect, concedes the question to be what was the intent of the parties upon a fair and reasonable construction of the agreement. The loss there arose from the storage of a large quantity of cotton in dangerous proximity to the boiler-deck and steam chimney, and he was of the opinion that this risk was not embraced in the contract by which the Navigation Company were not to be "responsible for the loss of any goods, &c., to be conveyed or transported by Harnden in said crate, or otherwise, in any manner in the boats of said company." Justice CATRON made gross negligence to consist in a failure of the servants of the company "in the lowest degree of prudence to guard against fire," and that such conduct was contrary to common honesty, and that the owners were as liable as they would have been in case of an affirmative and meditated fraud occasioning the same loss, and that the burning was a tort. He was also of the opinion that the boat was grossly and culpably deficient in facilities for extinguishing fires which made her unseaworthy. No case, I think, would now go with him to the full extent of the first part of his opinion, and the latter part is not inconsistent with any proposition advanced by me, and was sufficient to sustain the judgment. Justice DANIEL, with whom Justice GREER concurred, was of the opinion that the company was not liable for the loss, being exempted by their contract with Harnden, which took from them the character of carriers and charged them merely with certain duties in respect to the goods, for the non-performance of which alone they were liable, and that such liability rested solely in the special contract. Justice WOODBURY declined to express an opinion upon the effect of

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the contract. In *Alexander v. Greene* (7 Hill, 588), the judges of the court for the correction of errors did not agree in the reasons for reversing the judgment of the Supreme Court. Senator BOCKES thought it against public policy to relieve those engaged in steam navigation, whether in towing of boats, or carrying passengers from the consequences of the gross neglect of their servants, but finally was of the opinion that the risk occasioning the loss was not one of the risks intended to be assumed by the owner of the boat towed, and that to exempt the defendants from the legal consequences of their own neglect, the intention to do so should have been clearly and unequivocally expressed. He concludes his opinion thus: "But in this case I conceive no such contract was made, and the defendants remained liable for losses occasioned by ordinary neglect and so the case ought to have gone to the jury." Other senators were of the opinion that the defendants were common carriers, and did not consider the effect of the terms of the permit upon their liability. Senator PORTER was of the opinion that the contract would not admit of a construction that should protect the defendants from a loss arising from gross negligence. It would seem that the case was in truth decided upon the construction of the contract, as was the case of *Wells v. The Steam Navigation Company* (4 Seld., 375), upon a precisely similar contract: see *S. C.* (2 Comst., 204). *Dorr v. The New Jersey Steam Navigation Company* (1 Kern., 485), decides without qualification that common carriers may limit their liability by an express agreement, that is, that the parties may make their own contract and limit the precise extent of their respective risks and liabilities: and see *Clark v. Rochester and Syracuse Railroad Company* (4 Kern., 470), and per ALLEN, J., in *Mercantile Mutual Insurance Company v. Calebs* (20 N. Y., 176). Most certainly the result is in harmony with that class of decisions which exempt the principal from losses arising from the ordinary risks incident to the employment of a servant, including the negligence of his fellow servants, and hold him responsible for damages resulting from his own default and misfeasance. The first

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class of risks are impliedly assumed by the servant, but the law will not infer that he undertook to relieve the master from the consequences of his own omission of duty, for that would be unreasonable. As said before, the contract before us in terms embraces every degree of negligence that does not impute personal blame to the defendants, and the case is not within the difficulties of construction that were encountered in 7 Hill and 4 Selden.

I am for a reversal of the judgment and the granting of a new trial upon the usual terms.

SELDEN, Ch. J., and GOULD, J., concurred in this opinion.

Judgment affirmed.

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JOHNSON v. JENKINS.

In an action for breach of promise, evidence, drawn out by the plaintiff, of declarations by the defendant, tending to prove that his failure to marry the plaintiff proceeded from no want of respect or attachment to her, is proper for the consideration of the jury, in mitigation of damages. The defendant in such an action is entitled to prove the truth of such declarations, and to show that his mother, a woman in infirm health, was strenuously opposed to the match.

APPEAL from the Supreme Court. Action for breach of promise of marriage. The plaintiff had a verdict for five thousand dollars at the circuit, and the judgment was affirmed at the general term, in the third district. The defendant claimed a reversal, on the ground that two errors were committed by the judge at circuit, First, in permitting the following question to be put to a witness: How was Louisa (the plaintiff), affected by the discontinuance of the defendant's visits, and Secondly, in excluding the offer of the defendant to prove, in mitigation of damages, that the defendant's mother was strenuously opposed to the defendant's marriage with the plaintiff, and that she was in feeble health, and had been for

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some time, being weak, nervous and subject to hysterical attacks. The defendant was a young man, an only son, and lived with his parents. It had been proved, that on one occasion when asked the reason why he had discontinued his visits to the plaintiff, he had declared that his affection and regard for her were undiminished, but that he could not marry her because his parents were so violently opposed to the match. The defendant's counsel asked the court to charge that his expression and conduct on this occasion, might be taken into consideration by the jury to mitigate damages. The court refused so to charge, and the defendant excepted.

Amasa J. Parker, for the appellant.

John H. Reynolds, for the respondent.

ALLEN, J. The learned justice charged the jury, that this was one of a class of cases for which the law allowed what are called aggravated damages, that is, damages beyond and in no way measured by any proof of actual pecuniary loss or injury. By this I understand, that the jury were told, that in this class of actions, as in libel, slander, seduction, criminal conversation, &c., they were at liberty to give what are termed punitive damages, as distinguished from compensatory damages, that is, damages by way of punishment to the defendant, beyond what would fully compensate the plaintiff for the loss occasioned by the wrongful act of the defendant. This part of the charge thus understood, was in conformity with the decisions of this court in *Keezeler v. Thompson*, referred to, and reaffirmed in *Hunt v. Bennett* (19 N. Y., 173), and therefore the exception to it must be overruled. Damages in these actions, sometimes called vindictive, may be enhanced by such facts and circumstances as aggravate the injury itself. Circumstances under which an offence is committed, or a wrong done, may increase the real injury by adding to the indignity and contumely, increasing the mental agony, and bringing public disgrace and consequent loss of reputation upon the

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injured party. Such acts may directly increase and aggravate the positive injury sustained by the injured party, and may very properly enhance the damages which a jury may award. This action was tried upon the principles of the cases cited, and the theory that the damages were not limited by the actual loss or injury to the plaintiff, but were discretionary, that is, that the jury, in their discretion, might in the assessment of the damages, punish the defendant for the injury done. Of course this discretion was not understood by the court or jury to be an arbitrary discretion, but a discretion to be exercised in reference to the facts proved and the circumstances attending the injury complained of. If the abandonment of the plaintiff by the defendant, was wanton and ruthless, and so accomplished as to manifest an intent unnecessarily to wound her feelings, injure her reputation, and destroy her future prospects, all the circumstances showing the defendant to have been influenced by bad motives, then the largest measure of damages, not only by way of compensation to the plaintiff but, under the rule, by way of punishment to the defendant, were proper. If, on the contrary, the breach of promise was occasioned by a change of circumstances, which, without legally justifying, took from the abandonment all its character of cruelty and wantonness, and the defendant in withdrawing from his engagement, was tender of the feelings and reputation of the plaintiff, and so accomplished his purpose as to leave no stain upon her reputation, and do the least injury to her feelings and future prospects, it would be a case for compensatory damages merely. And so the just measure of damages may be varied by every shade and variety of circumstances between the two extremes, and hence every circumstance which can characterize the transaction, or throw light upon the acts and the motives of the actors is admissible in evidence.

It is not like an action upon a promissory note, where, the breach of promise being proved, the damages are fixed and certain, but the circumstances or the motives of the breach affect the damages. Every circumstance attending the breaking off of the engagement becomes a part of the *res gestæ*.

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The reasons which were operative and influential with the defendant are material, so far as they can be ascertained; and whether they are such as, tending to show a willingness to trifle with the contract and with the rights of the plaintiff, should enhance the damages, or, on the contrary, showing a motive consistent with any just appreciation of and regard for his duties, should confine the damages within the limit of a just compensation, will always be for the jury to determine.

The cause was left to the jury, withdrawing from them all that the defendant had said in conversations elicited by the plaintiff, as to the reason for his refusal to keep his promise, as a wanton and unexplained breach of promise, and necessarily an aggravated breach of promise deserving punishment. Had the defendant, by his declarations, shown a wicked mind in the transaction, it is evident that they would very properly have been submitted to the jury further to enhance the damages. (2 Greenl. Ev., §§ 266, 267; Mayne on Dam., 282.) It would seem to follow, that, when the refusal, as proved by the plaintiff, is accompanied with remarks and declarations doing ample justice to the plaintiff, and taking from the act the sting and injury, so far as kind feelings and good motives can take from a wrong act its sting and lessen its capacity to injure, such declarations should be submitted to the jury in mitigation of damages. The judge erred, I think, in instructing the jury that, so far as such declarations had been proved, they were not at liberty to consider them, to lessen their verdict. But the defendant offered to prove that the declarations were true, to wit, that his mother was strenuously opposed to the marriage with the plaintiff, and that he yielded to this parental opposition. This was excluded; and in this, I think, the learned justice also erred. It certainly was no bar to the action, and did not tend to reduce the damages below that amount which would compensate her most fully for all the loss sustained by her in reputation, anticipated future settlement in life, and mental and bodily suffering; but it did tend to mitigate the damages, so far as they might be aggravated or punitive. Evidence of this character was admitted in *Irvine*

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v. *Greenwood* (1 C. & P., 350), and in *McKee v. Nelson* (4 Cow., 355); and no intimation is found anywhere that it was improperly admitted, although the case first mentioned is cited in 1 Parsons on Contracts, 553, and it is plainly to be inferred that the ruling of the circuit judge in *McKee v. Nelson* was fully approved by the Supreme Court. To say that the plaintiff may enhance or aggravate the damages by proof of the circumstances attending the commission of the wrong, and that the like circumstances may not be given on evidence in mitigation, or rather in the prevention of punitive damages, when the jury may, in their discretion, allow punitive damages for an unexplained injury of this character, is not only unjust, but unreasonable. The law does not so unreasonably deprive one party of the benefit of facts which it gives to the other.

The judgment must be reversed and a new trial granted; costs to abide the event.

SELDEN, Ch. J., DENIO, SUTHERLAND, and SMITH, Ja., concurred.

DAVIES, J. (dissenting.) To arrive at a correct conclusion as to the propriety and correctness of the decisions at the circuit, it will be profitable to recur to the nature of the action, and the principles which regulate the recovery of damages therein. Although, technically, it is denominated an action for a breach of contract, the action being founded on a contract of marriage, yet it is, actually, given to afford an indemnity to the misused party for the temporal loss which the party has sustained in not having the contract fulfilled. And this has always been held to embrace the injury to the feelings and affections, wounded pride and the loss of marriage. (*Wells v. Padgett*, 8 Barb., 323.) It is a well-settled rule, that the damages in actions of contract are to be limited to the consequence of the breach of contract alone, and that no regard is to be had to the motives which induced the violation of the agreement. (Sedg. on Dam., 208.) To this general rule there is one exception. in the case of a breach of promise of marriage. In this

action, though in form *ex contractu*, yet, it being impossible, from the nature of the case, to fix any rule or measure of damages, the jury are allowed to take into their consideration all the circumstances, and, provided their conduct is not marked by prejudice, passion, or corruption, they are permitted to exercise an absolute discretion over the amount of compensation. (Sedg. on Dam., 210.)

In *Southard v. Rexford* (6 Cow., 254), WALWORTH, Circuit Judge, charged the jury "that, in cases of this kind, the damages are always in the discretion of the jury, and, in fixing the amount, they have a right to take into consideration the nature of the defence set up by the defendant;" and this charge was held unexceptionable by the court, which adds, "that there can be no well-settled rule by which the damages in every case are to be regulated. They rest in the sound discretion of the jury, under the circumstances of each particular case."

The question admitted under objection is not obnoxious to the criticism, made by the defendant's counsel, that it calls for the opinion of the witness. The plaintiff being entitled to recover damages for the injury to her feelings, expectations and wounded pride, as well as those occasioned by loss of the marriage, it was clearly competent for her to show how her feelings, affections and pride were affected by the breach of contract on the part of the defendant. It would have been competent for him to have shown, in mitigation of damages, that she regarded and treated his abandonment of her with levity, and was wholly unaffected by it; that she immediately formed another marriage engagement; and that her conduct was otherwise objectionable. I see no objection, therefore, to the plaintiff showing how she was affected and acted on the occasion of the defendant's misconduct. It was not laying the ground for any specific recovery for damages on account of the effect upon her feelings, but as an element for the further consideration of the jury. It was only showing a fact which naturally and obviously resulted from a breach of such a contract, when there was affection and sincerity on the part of the

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plaintiff. The testimony was, therefore, properly admitted. In *Johnson v. Caulkins* (1 John. C., 116), the Supreme Court of this State held that, with a view to the mitigation of damages in an action for breach of contract of marriage, it was competent for the defendant to show licentious conduct in the plaintiff, and her general character as to sobriety and virtue. In *Willard v. Stone* (7 Cow., 22), the Supreme Court held that evidence of the gross and indecent familiarity between the plaintiff and another person should have been received in mitigation of damages. The same rule was affirmed in *Palmer v. Andrews* (7 Wend., 142). It was the conduct of the plaintiff which it was held to be admissible in mitigation of damages. The rules governing this action are clearly laid down by SEDGWICK, J., in *Boynston v. Kellogg* (3 Mass., 189). They are, 1. That, if the plaintiff was of bad character at the time of the promise of marriage, and that was unknown to the defendant, the verdict ought to be in his favor; 2. If the plaintiff, after the promise, had prostituted her person to any other than the defendant, she clearly discharged the defendant; 3. That, if her conduct was improperly indelicate, although not criminal, before the promise, and it was unknown to the defendant, it ought to be considered in mitigation of damages; 4. That, if such was her conduct, after the promise, it was also proper for the consideration of the jury in mitigation of damages.

It will be observed that in all these cases the conduct of the plaintiff was admitted to mitigate the damages. And although it is true that the conduct of the defendant had been always admitted to aggravate the damages, it has never yet been allowed to mitigate or reduce them when the plaintiff would otherwise be entitled to recover. It is difficult to perceive on what principle such evidence is to be allowed. The conduct of the plaintiff in a case where the recovery for damages is allowable, may be availed of by the defendant to reduce or mitigate what the jury would otherwise be authorized to allow the plaintiff for the breach of contract on the part of the defendant. So, also, the improper conduct of the defendant, as

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in seducing the plaintiff under promise of marriage, may be given in evidence to aggravate the damages. It is not seen upon what principle the conduct of the defendant, or of those connected with him, or the influences which they may exercise over him, can be imputed to the plaintiff so that the effect shall be to mitigate or reduce what she would otherwise be entitled to recover. If this be so, why should not the conduct and acts of the plaintiff and those connected with her be given in evidence to aggravate or enhance the damages which she would otherwise recover? No reason is perceived, why if the one state of facts is to be admitted to reduce the damages, why the other should not be to enhance them. It is the misconduct on the part of the plaintiff, in respect to the same transaction tending to diminish the degree of injury, which, on the whole, is fairly to be attributed to the defendant. (2 Greenl. Ev., § 267.) It is urged that the case of *Irving v. Greenwood* (1 Car. & P., 350), is an authority for the admission of the evidence embraced by the defendant's offer. That case is cited by Parsons (1 Para. on Con., 558; Saund. Pl., 666; 1 Phil. Ev., 190, by Edwards), as authority for the position, that evidence that the parents of the defendant disapproved of the engagement has been received in mitigation of damages. The case is not very accurately reported, and a careful examination of it will show that the point ruled falls far short of the text above quoted. It was a case of breach of promise, and was tried at *Nisi Prius* before ABBOTT, Ch. J. It is stated that the defendant's counsel wished to show in mitigation of damages, that the father and other relatives of the defendant disapproved of the match. It is stated that ABBOTT, Ch. J., allowed evidence to be given of their disapproval and the reason they assigned for it, but in stating what actually occurred on the trial, it is said the Chief Justice allowed it to be proven, the father of the defendant being an incompetent witness, that he, the father, had expressed to the defendant his dislike to the match on account of the bad character of the plaintiff. That bad character consisted in the fact that she had had a child by, as it was alleged, another man.

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Now it is seen that the only point ruled was, that the defendant might in mitigation of damages give in evidence the opposition of the father to the match, when he assigned as a reason for such opposition the bad character of the plaintiff. This case stands solitary and alone in the books as an authority, that the damages may be mitigated otherwise than by the conduct of the plaintiff. In *McKee v. Nelson* (4 Cow., 355), EDWARDS, J., at the circuit, allowed the father of the defendant to prove that he and the mother of the defendant remonstrated with him against his marrying the plaintiff. But the verdict having been for the plaintiff, the court did not pass on the objection taken by the plaintiff's counsel to the introduction of this testimony. It must be conceded that neither of these cases come up to the propositions of the defendant in this case. The offer in this case was to show that the defendant's mother was strenuously opposed to the defendant's marriage with the plaintiff. That she was in feeble health at that time, and had been for a long time. The plaintiff objected to the proof so offered, and it was excluded and the defendant excepted. The exception taken is to the exclusion of the whole proof so offered, and if any part was improper and illegal, the objection was properly sustained. It is not now contended that the state of the health of the defendant's mother could properly be shown in mitigation of the plaintiff's damages. It was therefore properly excluded, and the exception being to the exclusion of the whole offer, if any part was illegal and improper, the exception fails. But I prefer to put my opinion on the broader ground that the whole evidence was inadmissible. It never can be that the acts and conduct of third parties, produced it may be by the representations of the defendant, to enable him, more easily and with less hazard, to break his contract, can have any just or legitimate influence in reducing the damages which the plaintiff would otherwise be entitled to recover. It is the conduct of the parties to the match which is the subject of investigation, and the plaintiff can never be prejudiced by the acts and conduct of others with whom she has had no connection, and

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which was not influenced by anything which she had done. The sanction of such a rule would, in my judgment, be an intimation to parties that they might violate their contract almost with impunity.

The judgment should be affirmed.

WRIGHT and GOULD, Js., were also for affirmance.

Judgment reversed and new trial ordered.

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COMPANY.

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A railroad corporation which has completed its road between the termini named in its charter or articles, forfeits its franchise by abandoning or ceasing to operate a part of the route.

It seems that the corporation owes a duty to the public to exercise the franchise granted to it, and that it cannot abandon a portion of its road and incur a forfeiture at its mere pleasure. *Per DENIO, SUTHERLAND, ALLEN, and SMITH, Js.*

The remedy, however, is not an action in equity, on behalf of the public, to enforce a specific performance, but by mandamus or indictment or, at the election of the State, by proceeding to annul the corporation. ●

APPEAL from the Supreme Court. A corporation, under the name of the Albany Northern Railroad Company, was formed, in 1851, pursuant to the provisions of the general railroad act, for the purpose of constructing, maintaining and operating a railroad between the city of Albany and Eagle Bridge, in the county of Rensselaer. The road was constructed, and put in operation in 1853, and continued to be run until September, 1859. The Company, in 1852, had given a mortgage upon all its property and franchises, which was foreclosed and the mortgaged property sold on the 15th September, 1859. The purchaser at such sale, and his associates, on the 6th October, 1859, organized a new corporation, under the name of the Albany and Vermont Railroad Company (the

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defendant), for the purpose of maintaining and operating the purchased road; and in the articles of association it was stated that the road of the new Company was that "originally owned, constructed, maintained and operated by the Albany Northern Railroad Company, running from the city of Albany to Eagle Bridge, in the county of Rensselaer, from and to which places the same is to be maintained and operated." For fifteen days after its organization, the defendant operated its railroad from Albany to Eagle Bridge, and then wholly ceased to operate that part of the same lying between Waterford Junction and Eagle Bridge (about twenty-one miles of the entire route), but has continued to operate the part between Albany and Waterford Junction. In September, 1860, with the view of wholly abandoning the operation of that part of its road, the defendant took up and removed all the iron rail thereon between Waterford and Eagle Bridge, and between those points so dismantled the structure as to render it wholly unfit for use and travel for railroad purposes. The defendant being engaged in removing, with a view to abandonment, the iron track and fixtures used in the operation of its road east of the Waterford Junction, this action was commenced by the Attorney-General. The complaint prayed that an injunction might be granted, restraining the selling, taking up or removing of the iron track and fixtures of said road, and demanded, as relief, that the defendant be required to reopen and operate, for public use, that part of its railroad from Waterford Junction to Eagle Bridge, and specifically perform all the duties and obligations resting by law upon it as a railroad corporation.

The trial was before a referee, who dismissed the complaint. Upon appeal judgment, entered on his direction, was affirmed at general term, in the third district, and the plaintiff appealed to this court.

John H. Reynolds, for the appellant.

John B. Gale and William A. Beach, for the respondent.

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WRIGHT, J. The defendant has voluntarily abandoned all of its road east of the Waterford Junction, whilst it is continuing the operation of that part between Albany and Waterford, in connection with the Rensselaer and Saratoga Railroad. It is exercising its corporate rights and privileges, and the franchise granted by the State to maintain and operate a railroad between Albany and Eagle Bridge, in the operation of one between Albany and Waterford Junction, without any assent by the legislature to the abandonment of any part of its road, or any legislative modification of the franchise granted to it. This cannot be legally done. It is the exercise of a franchise or privilege not conferred upon the defendant by law. But it is not the precise question now presented. The present question is, whether a railroad corporation, formed under the general act, for constructing, maintaining and operating a railroad upon a definite route and between places specified in its articles of association, may be compelled by a court of equity, in an action brought by the State, after it has constructed its road, to continue to maintain and operate it. Of course, it is not pretended that such an action can be maintained, or the power exercised by the courts, unless the obligation, or duty, is imposed by law on the corporation to maintain and operate its road for the public use and benefit.

The inquiry primarily suggested is, whether there be any express legal obligation or duty, or any to be necessarily implied, resting on a railroad corporation, to maintain and operate its road for the public use, irrespective of its own interests. If any such obligation or duty is imposed, it is by the general law under which the corporation is created, or to be implied from its provisions, or those of the charter of the company. The railroad act does not, in terms, require a company organized under it to construct, maintain or operate the railway mentioned in its articles of association. The act is permissive, and not mandatory. The associates are endowed with corporate existence, and, as a corporation, vested with powers to construct and operate a railroad for the conveyance of persons and property between established points, and, in this sense, to

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exercise a public employment. The associates, by the act of acquiring corporate existence, do not absolutely agree with the State that, in consideration of such corporate existence, and the franchise with which they are invested, that they will construct the railroad mentioned in the charter, and continue to operate it during their corporate existence. No contract obligation is thereby created on the part of the corporation. This is apparent from the act itself. The corporation is first brought into existence, and powers conferred on it for the execution of a special purpose, viz., to construct, maintain and operate a railroad for the conveyance of persons and property. There is no absolute requirement, or obligation assumed, by the corporation created under the act, to execute the purpose. Indeed, the law itself contemplates that there may be an omission or neglect to carry out the object of the association, and a non-user of the corporate privileges. Unless the corporation begins to construct its road, and expend ten per cent of its capital in such construction, within two years after its articles of association are filed, or finish the road and put it in operation in five years from the time of filing such articles, its corporate existence and powers are to cease. (Laws of 1850, ch. 140, § 47.) The penalty for the non-user of the corporate rights and privileges for five years, is a forfeiture of such rights and privileges. It is optional with the corporation whether it will exercise the powers bestowed, or undertake the work; and, being so, the grant and acceptance of the railroad franchise cannot properly be construed as a contract between the State and corporation, binding the latter to construct and maintain the railroad for the public benefit. It is only from the charter and its acceptance that any contract relation between the State and the corporation can arise; and such contract must be operative, if at all, the moment the charter is accepted. The provisions of the railroad act negative the idea that any contract relation between the State and the corporation formed under it springs out of the grant and acceptance of the franchise. There is, therefore, no contract obligation resting on a corporation, brought into existence by the railroad act, in favor of the State or interested

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citizens, to construct, maintain and operate, for the public convenience and use, the road named in its articles of association. But is the duty specially declared, or necessarily to be implied from the provisions of the railroad act? There is no such duty specially declared. There are no express words of the act requiring the corporation created under it to make and maintain the roadway. Had there been, there would probably have been but few corporations formed under it. Nor do I think the duty can be clearly collected from the general purview of the whole statute. To promote the construction and maintenance of railroads to be publicly used in the conveyance of persons and property, is undoubtedly a purpose of the law. It invites capitalists into this field of enterprise, not as public servants, charged with a public duty, but as private corporators, whose privileges are to be exercised, if at all, under limitations and restrictions, looking to the benefit of travelers and patrons of the work. The legislature, in effect, say, as the proposed road is to be of public utility, we empower you to build and operate it, and to that end confer on you corporate existence and the power to act in a corporate capacity, and also the further power to take lands for corporate use, *in invitum*. The corporation is essentially a private one. If it constructs and operates the road, it is to do it under the limitations and restrictions imposed by the law. It may never, however, enter upon the construction of the proposed road. Insurmountable obstacles may intervene to the prosecution of the work. The law seems to contemplate such a state of things; and provides that, in the event of non-user of the corporate privileges, or a non-completion of the road within a limited period, such corporate privileges shall cease. These provisions are inconsistent with the idea that the duty is assumed by the company to construct the proposed road from having obtained a charter for that purpose, or that it is within the scope or intention of the act to absolutely impose, for public benefit, such duty on the corporators. Permission is given to make the road, and the law leaves the question of the exercise of its powers to the option of the company. This would not have

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been so, if the legislature had intended to require the construction and operation of the proposed road for any period whatever. For anything of an obligatory character in the act, the associates, after corporate organization, may proceed to construct the projected road, or they may omit or neglect to do it and forfeit their corporate privileges. This option existing, it negatives the notion that any duty is imposed to build the road. And if no duty is imposed to construct, it must follow that there is none to maintain and operate the road after construction. Such duty cannot be created by the act of the corporation itself. There is nothing in the railroad act, nor power anywhere, to prevent a railroad corporation from abandoning its road and forfeiting its corporate privileges by non-user, if it chooses to do so. Neither by the provisions of the statute, nor otherwise, is it under any legal obligation, or owes any duty to the State or the public, to maintain and operate its road for an instant of time after its own interests shall cease to be subserved thereby.

If, then, there be no legal obligation or duty, springing out of the grant and acceptance of a railroad franchise, or imposed by the railroad act, resting on the corporation to maintain and operate its road for public use, the state cannot maintain an action or a court of equity compel its maintenance and operation. The obligation or duty in favor of the State or the public must exist, or it cannot be enforced. It is only upon the theory of an existing obligatory contract between the State, and the corporation, binding the latter to maintain and operate the railroad for the use of the public, or that such duty is imposed by law, that the State can interfere by action, or the courts compel a specific performance. Indeed, if the duty be merely enjoined by the railroad act, I cannot well see how it can be enforced by action. The railroad franchise is granted upon condition, that the corporation will construct and operate the railroad named in its articles of association. Grants upon condition, without express covenant, are never the subject of an action for specific performance. The right is forfeited, and the redress is by reclaiming it. Besides, were the breach is of

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a mere statute duty, an action is not the appropriate remedy. It has been held, that when the duty to build a railroad was imperative by the act authorizing it, that it could not be enforced by injunction, at the suit of the Attorney-General. (*Attorney-General v. Birmingham R. R.*, 7 Eng. L. & Eq. R., 288.) There are various duties charged upon companies by the railroad act, such as maintaining fences or farm-crossings. In such cases, an action by the Attorney-General for specific performance would be without a precedent. The only admissible remedies, it seems to me, for a breach of the duties charged on corporations by the railroad act, are mandamus, or quo warranto, or indictment.

I am of the opinion, that a railroad corporation, organized under the general act, cannot be compelled at the suit of the Attorney-General to reopen and operate a road that it has abandoned, and that if such corporation chooses to abandon its works, and no longer assert the corporate rights and privileges conferred on it by its charter, the remedy of the State is not by action for specific performance. The only remedy where there has been a total abandonment, and a non-user of the corporate powers, is an action by the people to vacate the charter or annul the existence of the corporation, and a like remedy is applicable, when the corporation shall abandon part of its road, and continue to operate the remainder under its corporate franchise. A company endowed with a franchise or privilege to maintain and operate a railroad on a fixed route, and between places named in its charter, cannot exercise the franchise or privilege in the operation of a road upon another route, and between other places. The franchise can only be legally exercised, by the corporation operating its entire road. There is no privilege granted or right obtained to operate a part thereof, and if it should undertake to do so, it is exercising a franchise or privilege, without legal sanction. An action is authorized by statute to be brought by the Attorney-General, in the name of the people of the State, on leave granted by the Supreme Court or a judge thereof, to vacate the charter or annul the existence of a corporation, whenever such corpo-

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ration shall exercise a franchise or privilege not conferred upon it by law. (Code, § 480.)

In the present case the defendant being endowed with the franchise or privilege of maintaining and operating a railroad between Albany and Eagle Bridge, has voluntarily abandoned the maintenance and operation of so much of its road as lies between the Waterford Junction and Eagle Bridge, whilst it is continuing to exercise its franchise and corporate rights and privileges in operating a railroad between Albany and Waterford Junction. The State cannot compel the corporation to reopen and operate the abandoned road. It cannot insist that the company shall exercise the rights and privileges conferred on it. If the company chooses not to use them, there is no power to compel their use. But the defendant, under a franchise or privilege granted to it to maintain and operate a railroad between Albany and Eagle Bridge, cannot legally operate one between Albany and Waterford Junction. It is the exercise of a franchise or privilege not conferred on it by law. Its charter may be vacated, or its corporate existence annulled; but because it is doing something not legally sanctioned, is no ground for constraining it to do what neither any contract, obligation nor the law requires of it.

I think the complaint in this case was properly dismissed at the special term. The people cannot maintain an action to compel a railroad company to operate its road for the use of the public after it shall have abandoned it for reasons peculiar to itself. Whilst the corporation exercises the franchise, it must do it under the limitations and restrictions imposed by its charter or by law. It may omit to use its franchise or privileges, or abuse its powers or exercise privileges not conferred on it by law, and thereby forfeit its charter or its corporate existence be annulled. Any remedy which the public may have for a breach or neglect of duty imposed by the railroad act, must be by mandamus, quo warranto, or indictment; and the performance of such duty cannot be specifically enforced in equity at the suit of the Attorney-General.

The judgment of the Supreme Court should be affirmed.

Burtis v. The Buffalo and State Line Railroad Company.

All the judges except SELDEN, Ch. J., and GOULD, J., who did not sit in the case, concurred in this conclusion. DENIO, SUTHERLAND, ALLEN, and SMITH, Js., however, were of the opinion that a corporation is under a legal obligation to exercise its franchises, and that it has not the option to discontinue a part of its road and forfeit its franchises. They agreed that the remedy is not by action in equity for a specific performance but by mandamus or indictment, or at the election of the people by proceeding to annul the existence of the corporation.

Judgment affirmed.

BURTIS v. THE BUFFALO AND STATE LINE RAILROAD COMPANY.

The statute (ch. 270 of 1847) making a company which owns a railroad connecting with one or more other roads, and receives freight to be transported to a place on the line of a road thus connected, liable as common carriers for the delivery thereof, applies as well where one of the connecting roads is wholly beyond this State as where all are within it. The statute not only imposes the duty, upon the company undertaking it, of delivering the goods at the place of destination but enables it to make a special contract for their delivery in a limited time.

Held, accordingly, that a company whose road terminated at the boundary of this State, where it connected with a chain of roads running through Pennsylvania, Ohio, &c., was liable under its special contract for the delivery of goods, in three days, at a point in Illinois, upon such chain of roads.

It seems that such special contract is valid at common law independently of the statute. (*Per* DENIO, DAVIES, GOULD, and ALLEN, Js.)

APPEAL from the Supreme Court. Action for damages arising from the failure of the defendant, a corporation created by this State, to deliver a quantity of fruit trees at the time specified by a contract between the parties. The trial was before a referee, who found these facts: On the 24th October, 1855, the plaintiff, a nurseryman, at Rochester,

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agreed with the general freight agent of the defendant for the transportation, from Buffalo to Chicago, of a large number of young fruit trees, which were designed, and the agent was so informed, for planting that fall. The agent agreed that they should be delivered at Chicago in three days. The trees were transported to Chicago, but some of them were delayed upon the route for seven and eight days, and their value was destroyed by their freezing. The line of the defendant's railroad terminated at the western boundary of the State, where it connected with a railroad running to Toledo, in Ohio, which there connected with a third railroad running to Chicago, in Illinois. The three roads were owned and operated by distinct and independent corporations, between whom no copartnership existed. The plaintiff had judgment, upon the referee's report, for \$4,822, besides costs. The judgment having been affirmed at general term in the eighth district, the defendant appealed to this court.

Eben C. Sprague, for the appellant.

Harvey Humphrey, for the respondent.

DENIO, J. The effect of the finding of the referee is, that Starke, the defendants' freight agent, had authority to make any contract for the transportation of property which the defendants could lawfully make by any instrumentality whatever. The language of the finding is, that said Starke was the defendants' acting freight agent, or master of transportation, and, as such, was authorized to receive property, to make contracts for such transportation, and to act as the general agent of such Company in that department of its business. We are to intend that this determination of the question touching his authority was warranted by the evidence; as we are not allowed to review the case upon questions of fact. There is nothing in the finding to qualify the comprehensive language to which we have referred; and, as has been said, it embraces the power to make any contract for transportation that the corporation had a right to make.

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The making of a contract by which the defendants, by Starke as their agent, undertook to transport the trees from Buffalo to Chicago in three days, and the breach of that contract, is also established by the special finding of the referee.

The single question remaining to be examined is, whether the defendants' corporation had power to enter into such a contract. If we should deny the existence of that power, it might then become a question whether the defendants could excuse themselves from the consequences of the breach of a contract actually made in their name, by their duly authorized officers and agents, on the ground that it was without the scope of their corporate power. That would require a re-examination of the points discussed, but not decided, in *Bissell v. The Michigan Southern, &c., Railroad Companies* (22 N. Y., 258); but, in the view which I take of the case, these questions will not arise, for, in my opinion, the defendants had express legislative authority to make the precise contract upon which the present action was brought.

By an act passed in 1847 it is provided that, wherever two or more railroads are connected together, any company owning either of said roads receiving freight to be transported to any place on the line of either of the said roads so connected shall be liable as common carriers for the delivery of such freight at such place. The act further declares that, in case any such company (that is, the company receiving the freight) shall be liable to pay any sum by reason of the neglect or misconduct of any other company or companies, the company paying such sum may collect the same of the companies by reason of whose neglect or misconduct it became so payable (ch. 270, § 9).

The defendants' counsel argue that the statute does not apply where the connection, as in the present instance, is between a railroad in another State and one of our own roads, because the indemnity which is conferred upon the company which shall pay damages, against the delinquent company, cannot be enforced against a company in another State, it not being within the scope of our legislation or amenable in our courts; and that, for the same reason, freight embarked on a

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foreign railroad, to be carried over a road in this State running in connection with it, is not within the protection of the act. Hence it is insisted that such inter-State lines of railroads are not within the purview of the statute. This reasoning, though somewhat cogent, is not quite satisfactory to my mind. The act is eminently a remedial law, and should receive a liberal, as distinguished from a narrow, construction. It was, of course, known to the legislature that continuous lines of railroads, connecting this with conterminous States, had been and would continue to be constructed. The largest commercial town and the most active seaport of the Union being in this State, it was, of course, apparent that a very large amount of traffic between this and the neighboring States would pass over these inter-State lines. The motives which led to the enactment of the law applied quite as strongly to such lines of roads as to those which had their courses wholly in this State. A considerable proportion of all the merchandise sent by railroad from the city of New York passes into other States upon continuous lines of railroads, such as those referred to in this act.

I think it was not intended to impose the responsibility mentioned in the statute upon any of the railroads against the consent of the company owning them. The language is, that a railroad company, "receiving freight *to be transported*" to a place on the line of another road, shall be liable, &c. This, I think, is limited to cases of a company receiving property and agreeing, expressly or by implication, to carry it to a place on another connecting road. Should the company on whose road the property was first embarked, limit its undertaking to the line of its own road, the act would not apply, though it should be in the course of a transit to a place beyond its terminus, and should be directed to such place. The act, in my opinion, means, that if a railroad company will agree to carry property beyond the terminus of its own road, and receive the goods under such an agreement, it shall be liable as a common carrier for the delinquencies of the road running in connection with it on the route to the place of delivery. Any other construction would make the company receiving the property liable

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for the fault of the connecting road, contrary to the contract between it and the owner of the property; which could not have been intended. Upon the construction suggested, the true sense of the act is, that the company, on whose road the property is first sent forward, may agree for its transportation to a point on another road which connects with it, and that, in such a case, the first-mentioned road shall be liable as a carrier for any breach of duty respecting the property, whether it happen on the other road or on its own; but, if it occur on the connecting road, the owners of that road shall be responsible to the one which has become liable to the owner for the amount paid on account of such liability. The company receiving the goods may not be satisfied with the indemnity thus proffered, on account of the pecuniary circumstances of the company made liable, or because such company is not bound by the act, or not within the jurisdiction of our courts, or for any other reason; but, in either case, it may refuse to receive the goods "*to be transported*" to a place beyond its own line, and limit its engagement to carrying them to the end of that line and delivering them to the road next in order towards the place of final destination. Where, as in this case, there is an express contract to carry to a place on the line of another road, the case is within the spirit as well as the language of the act; and if the indemnity by action against the other company is not satisfactory, it is the fault of the party accepting it instead of limiting its contract to the line of its own road. The legislature afforded all the indemnity which it was in its power to give; and it left the receiving company free to contract in such manner as to need an indemnity, or to refrain from so contracting. There is more difficulty in applying the act to a transit of property from another State into this; the company on which the goods are embarked not being subject to our laws in respect to a transaction out of our jurisdiction. It may be that the legislatures of the adjoining States have provided, or will provide, by similar legislation, for traffic originating in those States; but, however this may be, we can clearly establish the law for companies operating roads in this State. As

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ration shall exercise a franchise or privilege not conferred upon it by law. (Code, § 480.)

In the present case the defendant being endowed with the franchise or privilege of maintaining and operating a railroad between Albany and Eagle Bridge, has voluntarily abandoned the maintenance and operation of so much of its road as lies between the Waterford Junction and Eagle Bridge, whilst it is continuing to exercise its franchise and corporate rights and privileges in operating a railroad between Albany and Waterford Junction. The State cannot compel the corporation to reopen and operate the abandoned road. It cannot insist that the company shall exercise the rights and privileges conferred on it. If the company chooses not to use them, there is no power to compel their use. But the defendant, under a franchise or privilege granted to it to maintain and operate a railroad between Albany and Eagle Bridge, cannot legally operate one between Albany and Waterford Junction. It is the exercise of a franchise or privilege not conferred on it by law. Its charter may be vacated, or its corporate existence annulled; but because it is doing something not legally sanctioned, is no ground for constraining it to do what neither any contract, obligation nor the law requires of it.

I think the complaint in this case was properly dismissed at the special term. The people cannot maintain an action to compel a railroad company to operate its road for the use of the public after it shall have abandoned it for reasons peculiar to itself. Whilst the corporation exercises the franchise, it must do it under the limitations and restrictions imposed by its charter or by law. It may omit to use its franchise or privileges, or abuse its powers or exercise privileges not conferred on it by law, and thereby forfeit its charter or its corporate existence be annulled. Any remedy which the public may have for a breach or neglect of duty imposed by the railroad act, must be by mandamus, quo warranto, or indictment; and the performance of such duty cannot be specifically enforced in equity at the suit of the Attorney-General.

The judgment of the Supreme Court should be affirmed.

Burtis v. The Buffalo and State Line Railroad Company.

All the judges except SELDEN, Ch. J., and GOULD, J., who did not sit in the case, concurred in this conclusion. DENIO, SUTHERLAND, ALLEN, and SMITH, Js., however, were of the opinion that a corporation is under a legal obligation to exercise its franchises, and that it has not the option to discontinue a part of its road and forfeit its franchises. They agreed that the remedy is not by action in equity for a specific performance but by mandamus or indictment, or at the election of the people by proceeding to annul the existence of the corporation.

Judgment affirmed.

BURTIS v. THE BUFFALO AND STATE LINE RAILROAD COMPANY.

The statute (ch. 270 of 1847) making a company which owns a railroad connecting with one or more other roads, and receives freight to be transported to a place on the line of a road thus connected, liable as common carriers for the delivery thereof, applies as well where one of the connecting roads is wholly beyond this State as where all are within it. The statute not only imposes the duty, upon the company undertaking it, of delivering the goods at the place of destination but enables it to make a special contract for their delivery in a limited time.

Held, accordingly, that a company whose road terminated at the boundary of this State, where it connected with a chain of roads running through Pennsylvania, Ohio, &c., was liable under its special contract for the delivery of goods, in three days, at a point in Illinois, upon such chain of roads.

It seems that such special contract is valid at common law independently of the statute. (*Per* DENIO, DAVIES, GOULD, and ALLEN, Js.)

APPEAL from the Supreme Court. Action for damages arising from the failure of the defendant, a corporation created by this State, to deliver a quantity of fruit trees at the time specified by a contract between the parties. The trial was before a referee, who found these facts: On the 24th October, 1855, the plaintiff, a nurseryman, at Rochester,

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agreed with the general freight agent of the defendant for the transportation, from Buffalo to Chicago, of a large number of young fruit trees, which were designed, and the agent was so informed, for planting that fall. The agent agreed that they should be delivered at Chicago in three days. The trees were transported to Chicago, but some of them were delayed upon the route for seven and eight days, and their value was destroyed by their freezing. The line of the defendant's railroad terminated at the western boundary of the State, where it connected with a railroad running to Toledo, in Ohio, which there connected with a third railroad running to Chicago, in Illinois. The three roads were owned and operated by distinct and independent corporations, between whom no copartnership existed. The plaintiff had judgment, upon the referee's report, for \$4,822, besides costs. The judgment having been affirmed at general term in the eighth district, the defendant appealed to this court.

Eben C. Sprague, for the appellant.

Harvey Humphrey, for the respondent.

DENIO, J. The effect of the finding of the referee is, that Starke, the defendants' freight agent, had authority to make any contract for the transportation of property which the defendants could lawfully make by any instrumentality whatever. The language of the finding is, that said Starke was the defendants' acting freight agent, or master of transportation, and, as such, was authorized to receive property, to make contracts for such transportation, and to act as the general agent of such Company in that department of its business. We are to intend that this determination of the question touching his authority was warranted by the evidence; as we are not allowed to review the case upon questions of fact. There is nothing in the finding to qualify the comprehensive language to which we have referred; and, as has been said, it embraces the power to make any contract for transportation that the corporation had a right to make.

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The making of a contract by which the defendants, by Starke as their agent, undertook to transport the trees from Buffalo to Chicago in three days, and the breach of that contract, is also established by the special finding of the referee.

The single question remaining to be examined is, whether the defendants' corporation had power to enter into such a contract. If we should deny the existence of that power, it might then become a question whether the defendants could excuse themselves from the consequences of the breach of a contract actually made in their name, by their duly authorized officers and agents, on the ground that it was without the scope of their corporate power. That would require a re-examination of the points discussed, but not decided, in *Bissell v. The Michigan Southern, &c., Railroad Companies* (22 N. Y., 258); but, in the view which I take of the case, these questions will not arise, for, in my opinion, the defendants had express legislative authority to make the precise contract upon which the present action was brought.

By an act passed in 1847 it is provided that, wherever two or more railroads are connected together, any company owning either of said roads receiving freight to be transported to any place on the line of either of the said roads so connected shall be liable as common carriers for the delivery of such freight at such place. The act further declares that, in case any such company (that is, the company receiving the freight) shall be liable to pay any sum by reason of the neglect or misconduct of any other company or companies, the company paying such sum may collect the same of the companies by reason of whose neglect or misconduct it became so payable (ch. 270, § 9).

The defendants' counsel argue that the statute does not apply where the connection, as in the present instance, is between a railroad in another State and one of our own roads, because the indemnity which is conferred upon the company which shall pay damages, against the delinquent company, cannot be enforced against a company in another State, it not being within the scope of our legislation or amenable in our courts; and that, for the same reason, freight embarked on a

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to be delivered beyond their own road, at a place on a connecting road, or at the terminus of one or more connecting roads, are responsible for its safe carriage to and delivery at such place, and liable for a loss which may occur beyond their own road. (*Weed v. Saratoga and Schenectady R. R. Co.*, 19 Wend., 534; *Hart v. The Rensselaer and Saratoga R. R. Co.*, 4 Seld., 87; *Foy v. The Troy and Boston R. R. Co.*, 24 Barb., 382; *Schoeder v. The Hudson River R. R. Co.*, 5 Duer, 55; *Cary v. The Cleveland and Toledo R. R. Co.*, 29 Barb., 36; *Muschamp v. Lancaster and Preston Junction Railway Co.*, 8 M. & W., 421; *Watson v. The Ambergate, Nottingham and Boston Railway Co.*, 3 Eng. L. & Eq., 497.)

The English cases appear to hold that, from the mere receipt of the goods marked for a place beyond the limits of the road of the railway carrier, in the absence of any special agreement, the undertaking or duty to deliver at such place is to be presumed.

The American cases appear to hold, that such an undertaking or duty would not be presumed from the mere receipt of the goods so marked or addressed. (*Van Santvoord v. St. John*, 6 Hill, 157; and the cases in 22, 23 and 24 Conn., and 1 Gray, before referred to.)

But it would appear to be settled, by both the American and English cases, that when, from usage in the particular business, or by receiving pay for the carriage of the goods to the place to which they are addressed beyond the railway company's road, or from any other circumstance, it is to be presumed that the undertaking of the railway company was to deliver at such place, that they are responsible for the delivery of the goods at such place, and liable if the goods are lost after leaving their own road.

Now, I am of the opinion that these cases cannot be upheld upon the ground of the power of the railway corporation to contract for such delivery beyond its own road, and thus, by contract, to become responsible for the defaults of other railway corporations; but that they may be upheld, independent of contract, upon the principle that a railway corporation, like

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any other common carrier, when it actually undertakes the trust of carrying the goods of another, and delivering them at a particular place, is responsible for their safe carriage to and delivery at such place. In other words, it appears to me that these cases should be considered as holding merely that corporations, as common carriers, are liable for a default or neglect of duty like other common carriers; that the fact of being a corporation does not absolve a railway corporation from the duty of the due execution of a trust actually undertaken by it as a common carrier, though the complete execution of the trust may involve action or responsibility on its part beyond the objects or purpose of its incorporation.

That one who actually undertakes a trust as bailee, is liable independent of contract, for want of due care in executing the trust, was held in the leading and familiar case of *Coggs v. Bernard*, (Lord RAYMOND, 909; *S. C.*, Holt R., 18. See also *Bissell v. Michigan, &c., R. R. Co.*, 22 N. Y., 254.)

A railway corporation may be liable for want of due care in executing a trust actually undertaken, which it has not power to contract to undertake. Suppose a railway company prohibited by their charter from running either freight or passenger cars on Sunday, should nevertheless run their cars on Sunday and undertake to carry A. B. or his goods on Sunday. Would not the company be liable for an injury to either, caused by the negligence of their employees, whilst thus running their cars in violation of their charter? It is plain to me that they would. The parties could not be said to be in *pari delicto*; nor could the company set up its own violation of its charter, as excuse for the negligence, and yet it is plain, that the company would have had no power to contract to carry either A. B. or his goods on Sunday.

Independent of contract, at common law, or by the custom of the realm, the duty and liability of a common carrier commenced with the receipt of the goods, and ended only with their delivery according to the undertaking or trust assumed. (*Hyde v. The Trent and Navigation Company*, 5 T. R., 389;

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De Mott v. Laraway, 14 Wend., 225; *Gibson v. Culver*, 17 Wend., 305.)

The use of the word undertaking in the books, in expressing the nature and intent of the trust assumed by common carriers, ought not to be understood as implying that their liability is necessarily founded on contract: a common carrier is liable independent of contract. (*Campbell v. Perkins*, 4 Seld., 430; *Bank of Orange v. Brown*, 8 Wend., 158; 1 Smith's Lead. Cases, 5th American Ed., 325, 326, note.) The case of *The Bank of Orange v. Brown*, is valuable, as containing a review of the English cases by SAVAGE, Ch. J.

At common law the action against a common carrier for the loss of goods might be either assumpsit or case; but in either action negligence was alleged. (*Bank of Orange v. Brown*, 8 Wend., 158, before cited; 2 Chit. Pl., 355, 351.)

The care and diligence required of common carriers and innkeepers by the common law are so extraordinary that proof of the non-delivery or loss of the goods is proof of negligence; so that, in effect, their liability is that of an insurer of the safe carriage or keeping of the goods entrusted to their care; although it is really founded on negligence—on a default of the care and diligence required of common carriers and innkeepers by the law as a duty; and injury resulting from the neglect of a legal duty is a tort.

Under the Code it is probable that in a complaint against a common carrier for the loss of goods, it would not be necessary to allege, either a formal assumpsit or negligence: that it would be sufficient to allege the receipt of the goods by the carrier to be carried and delivered at a certain place, and their non-delivery at such place within a reasonable time. Take such a complaint, and what is the ground of the liability claimed? Is it not default of duty, of a duty assigned by law independent of contract?

In the cases before referred to, and which the counsel for the plaintiff insists show that the defendants had power to make the contracts in question, the goods were delivered upon the usual assumed trust or implied undertaking of a common

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carrier to carry and deliver, with reasonable diligence, not under a special contract to carry and deliver within a specified time. In such a case I have endeavored to show the company might be held liable for the loss or non-delivery of the goods beyond their own route independent of contract. But in this case the action is upon special contracts to carry and deliver within three days, and the damages claimed and recovered were not for the loss or non-delivery of the trees, but for the failure to deliver within the time, according to the contract.

It is plain, then, that in this case the power of the defendants to make the contracts set out in the complaint is necessarily involved; and that if they had not power to make them the plaintiff cannot recover unless the defendants are estopped from setting up their want of power.

On the question of power the considerations above adverted to lead me to the conclusion that the defendants had not power to make the contracts set out in the complaint, and that they were, therefore, void. If void, I think it may be said that they were illegal, for it appears to me, proper to say, that the contract of a corporation (an artificial being deriving its existence and all its powers from law), which it has not power to make, is illegal.

On the question of power, the circumstance that the execution of the contracts involved the carriage of the goods on railways out of this State and in other States, I regard of no consequence. The defendants have power to do, or to contract to do, in another State with its assent, whatever they have power to do or contract to do in this. I think the question of power in this case is precisely the same as if the defendant had received the trees under a contract to deliver them at New York city or Ogdensburgh within a certain time.

In my opinion the act of 1847 (ch. 270, § 9), providing that when two or more railroads are connected, either company receiving freight to be transported to any place on the line of the other shall be liable as a common carrier for the delivery of such freight, does not affect the question of power in this case. The cases before adverted to would appear to establish

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the liability of the railway carrier in the case provided for by the statute, independent of the statute. The liability under the statute is certainly independent of contract, and for reasons before stated, I think the cases may be considered as establishing the liability independent of contract. But in this case the freight was received under special contracts to be delivered in three days; and the cause of action is the failure to deliver within the time, not the loss of the goods; the goods were delivered but not until some days after the contract time.

I see no room for the doctrine of estoppel in this case. It will not do to say that the mere fact of making a contract which a corporation has not power to make estops it from setting up the want of power. To apply the doctrine of estoppel on that ground alone would, in effect, abrogate the principle of the limitation of the powers of corporations resulting from their nature and creation and firmly established by law. If the contracts in this case had been within the scope of the general powers of the defendants, though void as to them for want of authority of the agent, or as made in violation of some by-law or regulation of the company, they might perhaps have been estopped from saying that they were void on either ground.

Having come to the conclusion that the contracts are void, and that the defendants are not estopped from availing themselves of their want of power, it is unnecessary to examine the question as to the rule of damages adopted by the referee.

My conclusion is, that the judgment of the Supreme Court should be reversed, with costs.

Judgment affirmed.

Leggett v. The Bank of Sing Sing.

LEGGETT v. THE BANK OF SING SING.

A provision in the articles of a banking association that the shares of its stock shall not be transferable until the shareholder shall discharge all debts *due* by him to the association, includes liabilities of the shareholder which have not matured.

Such a provision creates a valid lien as against an assignee of the stock, who takes with knowledge thereof, while the shareholder is under a contingent liability as indorser, and gives no notice to the bank of his claim until after the indorser's liability has become fixed.

THIS was an action upon the case for the refusal of the defendant to permit the transfer upon its books of twenty shares of the capital stock of the bank to the plaintiff as the assignee of one William E. Leggett. The cause was tried before a referee; and, upon the trial, it appeared that Leggett was one of the original associates in the organization of the bank, and became the holder and owner of twenty shares, of one hundred dollars each, of its capital stock. The articles of association required suitable books to be kept by the directors for the registry and transfer of the shares, and declared that "every transfer, to be valid, should be made on such books, and signed by the shareholder or his attorney duly authorized in writing." Section 3 of article 5 was in these words: "No share or shares shall be transferable on which any call for an installment of capital, or any interest on such installment, shall remain unpaid, nor unless the shareholder making the transfer shall previously discharge *all debts due by him* or her to said association, or shall have remaining capital stock untransferred sufficient to cover and secure the amount that he or *she may owe* to the said association." Section 4 of the same article made provision for the sale of the stock "whenever any shareholder of the association should owe a *debt then due* to the association, and which should have been

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due and unpaid for the space of three months." These provisions were, as the referee found, well known to the plaintiff.

On the 3d day of January, 1854, William E. Leggett sold and assigned his stock to the plaintiff, and delivered the certificate, assignment and power of attorney to transfer the same on the books of the bank to said plaintiff. On the 8th day of May, 1855, and again on the 10th and 14th days of the same month, the plaintiff demanded of the defendant, upon a production of the assignment and power of attorney and offer to surrender the original certificate of stock, that the stock be formally transferred on the books, and a new certificate thereof be delivered to the plaintiff; which was refused by the defendant, claiming that the original shareholder was a debtor to the bank, and that the stock was a security for the payment of such debt, and was not transferable until the same should be paid. It was admitted that William E. Leggett, on or about the 1st day of January, 1854, was indorser on notes of one Thompson, since deceased, to the amount of four thousand dollars, which notes were then held by the defendant; that Thompson died before said notes became due, and the notes were protested and the indorser charged; that W. E. Leggett became the executor of Thompson, and from time to time paid portions of said notes, and gave his notes as executor, indorsed by him individually, for the balance due. It also appeared that, on the 9th of April, 1855, there remained due of the Thompson debt one thousand nine hundred dollars, for which W. E. Leggett, on that day, made a note, payable on the first day of August thereafter, payable to his own order, and indorsed by him, and signed, "W. E. Leggett, Ex.," which note was outstanding and held by the defendant at the time of the demand of the transfer and new certificate in May, 1855. The referee decided that the note for one thousand nine hundred dollars not having matured at the time of the demand for a transfer of the stock, the same was not a lien upon the capital stock of the maker, and that the plaintiff was entitled to a transfer of the stock, notwithstanding such indebtedness, and gave judgment for the plaintiff for the value of the stock,

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which was affirmed by the Supreme Court sitting in the first district; and from that judgment the defendant appealed to this court.

John K. Porter, for the appellant.

David Dudley Field, for the respondent.

WRIGHT, J. The real inquiry is, was there a "debt due" from Leggett to the bank, within the meaning of the articles of association, at the time the transfer of the stock was demanded. It is not the question, whether, at the time the plaintiff became the equitable owner of the stock, by a secret, undisclosed sale, the shareholder was such debtor; nor whether the indorser of a promissory note, whose liability has not been fixed, falls within the class of debtors in respect to whom the lien was intended to attach. It may be conceded that it must be a fixed liability of the shareholder himself. The referee finds, and the case discloses the facts, that, in January, 1854, Leggett was the indorser on certain notes made by one Thompson and discounted by the bank, which had not then matured. Thompson died before the notes matured, and after their maturity Leggett reduced the amount of such notes by payments. On the 9th April, 1855, there was the sum of one thousand nine hundred dollars remaining due, for which amount Leggett made a note, payable at the defendant's bank on the 1st August, 1855, to his own order, and indorsed by himself. The note was signed "W. E. Leggett, Ex." Leggett thus undoubtedly became a debtor to the bank. If his contingent liability as indorser had not been fixed previously, he undertook then to become personally responsible for one thousand nine hundred dollars of the indebtedness. Affixing the letters "Ex." to his signature could not alter his personal liability or bind the estate of Thompson. This was the view taken by the referee and the Supreme Court. If Leggett was not a debtor of the bank, within the meaning of the articles of association, prior to the 9th April, 1855, he unquestionably assumed the relation at that time.

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But the referee placed his decision, not on the ground that Leggett was not indebted to the bank when the transfer of the stock was refused, but on what I deem to be an erroneous construction of the provision of the articles of association touching the question. The phrase, "all debts due by him or her to the association," was held to mean only debts presently payable, and that, although a stockholder may have borrowed on his own note the money of the bank and put it in his pocket, unless such note had matured, no lien attached, and the association could not lawfully refuse a transfer of his stock. This cannot be a correct interpretation of the sense in which the associates used the words, "all debts due," or designed that they should be understood. The provision was intended to embrace all debts which the stockholder owed the association, whether payable presently or in the future. Its purpose was, not to facilitate stockjobbing, but to promote the legitimate business of banking, and to benefit the bank by strengthening its securities; and it is in this light that the provision is to be construed. There is a much stronger reason for inferring an intention to embrace debts payable in the future rather than presently, growing out of the fact that most of the debts created with a banking institution are through the medium of discounted paper, where the credit of the borrower is extended. As was said in *Grant v. The Mechanics' Bank of Philadelphia* (11 Serg. & Rawle, 143), of what benefit would it be if the stockholder had the unrestrained right of transfer at any time before his note fell due? The time of making the loan is that at which the directors must look for security. To construe the provision to embrace only debts presently payable, would be to limit it for the benefit of the borrower, and not the association. The whole provision, taken together, shows that the object of making the stock not transferable was to "cover and secure" the amount owing by the stockholder to the association, whether due and payable *in presenti* or *in futuro*. The restraint is upon transferring the stock, "unless the shareholder shall previously discharge all debts due by him to said association, or shall have remaining capital stock untransferred suffi-

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cient to cover and secure the amount that he may owe to said association." The expression, "the amount that he may owe," is evidently intended as the equivalent of the previous phrase, "debts due;" each being used to denote the indebtedness which the stock was to "cover and secure." The apt and explicit words used by the associates in the succeeding section of the fifth article, to limit the right of sale to cases of actual default, shows that they had no difficulty of discriminating, when that was their purpose, and excludes the idea that the general words of the previous section were used in the same restricted sense.

When, therefore, the bank was first notified that the stock had been assigned to the plaintiff, and the latter demanded that it should be transferred to him, Leggett, the shareholder, was a debtor to the bank, and on that ground, I think, such transfer was rightly refused. It can make no difference with the question if it should be conceded that, in January, 1854, when the plaintiff became the equitable owner of the stock, Leggett was not a debtor to the bank, and that then, had a transfer been demanded, it could not have been legally refused. Nor is it important to determine what would have been the rights of the plaintiff and the bank, had the plaintiff, upon becoming the equitable owner of the stock, notified the bank that he was such owner. Nothing of the kind was done. The case is presented of the plaintiff, unknown to the bank, in January, 1854, purchasing a shareholder's stock, and taking an assignment of a certificate expressing on its face that the shareholder's title was, subject to all conditions and stipulations in the defendant's articles of association, transferable only on the books of their banking-house, by him or his attorney, on delivery of such certificate; and that, although knowing that the articles of association gave the bank a lien on such stock for any debts due from the shareholder at the time the transfer was demanded, neither notifying the bank that he was such owner, or demanding a transfer, until sixteen months after the alleged secret purchase, and after the shareholder, if not a debtor to the bank at the time of sale, had subsequently become such debtor.

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The lien unquestionably attaches in respect to the shareholder's debts existing when the bank is asked to transfer the legal title; and one becoming the owner of stock, subject to a provision in the articles of association giving the bank such lien, and of which he has knowledge, but who omits to give the bank notice of his ownership, and thereby enables his vendor to have credit on the faith of his being a stockholder, has no superior equity to be enforced.

The judgment of the Supreme Court should be reversed, and a new trial ordered, with costs to abide the event.

DENIO, DAVIES, GOULD and SMITH, Js., concurred.

ALLEN, J. (dissenting.) The corporate powers of the defendant are derived wholly from the general banking law under which it became incorporated. It can exercise no power except such as is authorized by that act, which is the organic law of every corporation created under its authority. But the dealings of the associates with each other, and the rights of shareholders over their stock, are not among the corporate powers of the institutions organized under the law, and are not to any great extent regulated by it. The declaration that the shares of the association shall be deemed personal property and transferable on the books of the association in such manner as may be agreed on in the articles of association (Laws of 1888, ch. 260, § 19), has respect only to the *modus operandi* of the transfer and not to the right of transfer or to any restrictions upon such right. There is no authority in the law for any restraint upon the power of alienating the capital stock of the association formed under it; and the provision in the defendant's articles of association imposing conditions upon the rights of shareholders to transfer their stock, does not rest for its vitality upon any law of the State or by-law of the association. It rests only upon the agreement of the shareholders. The original subscribers, of whom Wm. E. Leggett was one, by signing the articles became parties to the agreement, and every subsequent purchaser of the capital

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stock by accepting a transfer of the original scrip or new certificates for the shares bought, assented to the terms and conditions upon and subject to which the stock was held by the shareholders as declared by the certificates to it, as "subject to all conditions and stipulations in their articles of association." As an agreement in effect making the debt of the shareholder a lien upon his stock, it is not prohibited by any law and is inconsistent neither with any statute nor with public policy. A pledge of the stock in security for the payment of a debt actually contracted would clearly be valid, and an agreement pledging it, given in advance of the debt, can be nevertheless valid. Similar provisions in special charters granted by the legislature are not unusual, which is high evidence that public policy sanctions them; and courts have sustained and enforced such provisions. (*Union Bank of Georgetown v. Laird*, 2 Wheat., 390; *Bank of Utica v. Smally*, 2 Cow., 770.) Each association organized under the general banking law may incorporate such special powers in its articles of association not inconsistent with the laws of the State as the associates shall think expedient, and these special provisions will have the force of law with the associates. The articles of association, the voluntary agreement of the associates in regulating the terms of their association and their rights as members thereof, takes the place of a special charter and performs its office.

I am constrained, however, to differ with the court below in the construction of the provisions upon which the defence rests. The learned justice, pronouncing the judgment of the Supreme Court, was of the opinion that it only related to debts actually due, and that a shareholder or debtor of the bank, if his indebtedness had not matured, might transfer his stock and the bank had no lien thereon. So far as material to this case the provision is that "no share or shares shall be transferable unless the shareholder making the transfer shall previously discharge all debts due by him or her to said association." The very restricted interpretation of the court below practically nullifies the provision. If the debtor or shareholder can, the day or the hour before his debt to the bank becomes

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due, transfer his stock and deprive the bank of its contemplated lien under this clause of its articles of association, the whole intent and design of the provision would be valueless. The words employed do not call for such interpretation. A reasonable construction of the term "debts due," and that which in ordinary usage would be given it, would carry out the intent of the associates and include within the benefits of this section all debts actually contracted and existing, whether due or yet to become due. Neither is there any such technical and restricted meaning given to the words by lexicographers or jurists as to confine them to debts actually due and payable. The legal acceptance of "debt" is a sum of money due by certain or express agreement (8 Bl. Com., 154). A debt in ordinary parlance means any claim for money, and a debt is properly said to be due, in the sense of *owing*, when it has been contracted and the liability of the debtor is fixed. (Burr. L. Dict.; Bouv. L. Dict.) Debt and due are both derived from the same verb; the former is a substantive, and in this instance the latter is used as an adjective. Debt also means that which is due from one person to another, and the word due does not necessarily vary the meaning; as that means, in one sense, simply owed. It may, when used with that intent, mean a debt actually payable, the time for the payment of which has arrived. The context and the circumstances under which it is used must determine in what sense it is used. Due, when used as a noun, is synonymous with debt.

"Due," applied to "debts," preferred by an act of Congress, is equivalent to "owed" or "owing," and includes all debts although payable in future. (*United States v. The State Bank of North Carolina*, 6 Pet., 29.) The obvious meaning of the clause in the defendant's charter is, that the shareholder shall discharge all debts owing by him before he shall transfer his stock. Was, then, W. E. Leggett, on the 3d day of January, 1854, the day on which the plaintiff claims to have acquired title to his stock, a debtor to the defendant? He was at that time an indorser on notes held by the defendant made by one Thompson which had not then matured; that is, he was con-

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tingently liable to the bank for the debt of Thompson, and his liability could only become absolute when he should be charged as indorser. His engagement was conditional, dependent upon the default of the maker in the payment of the note upon due demand and reasonable notice of such default to himself. He became a debtor when his liability became fixed and certain and not before. The sum of money mentioned in the notes thus became a "*debt due by him*." A contingent liability is no more a debt existing against or owing by an individual when the liability is created by becoming a party to commercial paper, than when it is incurred in any other form. A surety in an undertaking given upon an appeal or on an appeal bond, is from the moment he signs the instrument and it is used for the purpose intended, contingently liable for the debt and default of his principal; but in neither case would he be the debtor of the appellee or of the State, and yet his liability cannot in principle be distinguished from that of an indorser of a promissory note. The difference is only modal, and relates to the conditions upon which the liability may become absolute.

In ordinary parlance, as well as in statutes, and in ordinary legal acceptation, a distinction is recognized between a debt, although not actually payable, *debitum in presenti solvendum in futuro*, and a contingent liability which may ripen into an absolute liability and become a debt in the ordinary sense of that term. *In re Drury* (2 Hill, 220), a debt signifies whatever any one owes, and he does not owe that for which he is only conditionally or provisionally liable. (*People v. Morrill*, 3 Seld., 124.) The obligation of a contract does not become a debt, within the sense of the prohibitions of a city charter forbidding the common council from authorizing an expenditure within the current year exceeding the amount of the annual tax levy, until money becomes payable according to its terms. (*Weston v. The City of Syracuse*, 17 N. Y., 110.) Under the general act for the incorporation of manufacturing corporations (ch. 40 of 1848), stockholders are liable for debts incurred by the corporation before the stock is fully paid; and

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trustees are made individually liable for a debt of the corporation contracted during a default in filing and publishing the annual report required by law. In construing and giving effect to that law, this court has held that under a contract between an individual and the corporation, that the former should deliver and the latter receive and pay for personal property at a future day, a debt does not arise until the delivery of the property; that is, the contingent liability becomes a debt only when the obligation to pay becomes absolute by the performance of the conditions or the happening of the contingency upon which this obligation to pay depends. (*Garrison v. Howe*, 17 N. Y., 458.) The principle now asserted is not affected by the cases holding that for certain equitable purposes and for the prevention of a fraud, a party contingently liable upon a contract may be deemed a debtor—as in *Elwood v. Diefendorf* (5 Barb., 398)—for the purpose of enforcing against a devisee a debt which a testator was equitably bound to pay, and who had charged his debts upon lands devised, and in *Van Dyck v. Seward* (18 Wend., 375), and other similar cases, holding that a contingent liability was within the meaning of the statute, avoiding all gifts, &c., made to hinder and delay creditors. The same equitable extension of the statute has been made to protect demands and claims for torts, which are in no just sense debts. (*Jackson v. Myers*, 18 John., 424; *Fox v. Hills*, 1 Conn., 295.) Giving the provision all the effect which can be claimed for it under a literal construction, and it cannot make him a debtor to the bank so as to charge his stock and prevent its transfer, who is only contingently liable for the contract and engagement of a third person. W. E. Leggett was not then a debtor to the bank on the 3d of January, 1854, and had the free disposal of his stock.

He did on that day, for a valuable consideration, sell his stock to the plaintiff, assigning and delivering to him the evidences of his title, the original scrip or certificate issued by the defendant, executing and delivering at the same time a formal power of attorney to transfer the stock upon the books of the bank. Notwithstanding the declaration in the defendant's

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articles of association, that "every transfer [of stock] to be valid shall be made on the transfer books," this assignment was valid as between the parties to it, and vested in the plaintiff the equitable title to the stock, and the right to be substituted upon the books of the bank as the legal holder of it. Had the plaintiff on the same day of the assignment demanded the formal transfer upon the books of the bank, he would have demanded but his legal rights, and an action would have lain for the refusal. Whether equity would have compelled the specific performance of the duty of the bank to permit the transfer, or the courts would have interfered by mandamus, it is not necessary to inquire. It is sufficient that the transaction gave to the plaintiff the equitable title to the stock, and recognized a legal right to the formal legal title, and the usual evidences of such title. The rights of parties standing in the situation of the plaintiff, are too well settled to be the subject of discussion in the courts of this State. The assignor and holder of the scrip is the owner of the stock as against the assignee, and as against all persons not having a prior equity, and the legal title is only not transferred as respects the bank, and for its protection. The bank, until a transfer of the stock in the mode prescribed by its charter, may recognize the vendor as still the real owner, and may pay to him the dividends and give him in the conduct of the affairs of the bank, all the rights of a stockholder. The sole object and purpose of the requirement of this formal transfer, is the convenience of the bank to this extent. The provision does not interfere with the rights of ownership as between the original stockholder and his vendee or pledgee. Such is undisputably the law in this state, as settled by the decisions of all the courts. (*Bates v. New York Insurance Company*, 3 J. R., 238; *Bank of Utica v. Smally*, 2 Cow., 770; *Stebbins v. Phoenix Fire Insurance Company*, 3 Paige, 250; *Commercial Bank of Buffalo v. Kortright*, 22 Wend., 348, affirming same case, 20 id., 98.) It is true that the decisions in the courts of other states are contrary to the rule adopted, and so well settled in this State; and the judges expressly disregard the principle settled by the

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court for the correction of errors in Kortright's case, and which we regard as law. See per Chief Justice SHAW, *Fisher v. Essex Bank*, 5 Gray, 383. He cites the Massachusetts, Connecticut and Vermont cases, as directly in conflict with the cases in our own courts. So long as our own decisions are to be regarded, we must follow out and apply those principles and results, and cannot engraft upon our rules the principles and results of decisions not in harmony with them. The New England courts have made the transfer of stock in corporations, whose charters require a transfer upon the stock book, an exception to the general rule regulating the transfer of property, and have given the clause in the charter a stringent and far-reaching effect, which is denied to it in our courts. Those cases deny all equities to the purchasers of stock, whose title does not appear upon the books of the bank, as against all persons who have no notice of the change of title, treating the stock book as the only legitimate evidence of title, and ignoring the scrip as of any value; and hence even creditors may attach stock standing in the name of their debtor, although it has been actually sold and the scrip transferred to a *bona fide* purchaser. (*Fisher v. Essex Bank*, *supra*; *Salem v. Bank of Woodstock*, 21 Verm., 362; *Oxford Turnpike v. Bunnel*, 6 Conn., 558.) We cannot adopt the principle of these cases without directly overruling all the cases in our own courts. In this State, the formal transfer upon the books of the bank, is regarded as not affecting the transaction between the parties, but as required for the convenience of the corporation and its protection; and if any other effect is to be given to it, it is in reference to the personal liability of stockholders to creditors, and as charging those who appear on the books as stockholders. But as between the parties to the sale and third persons, the same effect is given to a conveyance of the stock outside of the books, as is given by law to assignments of choses in action, or rights not negotiable or assignable. The transferee is regarded as the equitable owner, and the transferor as his trustee; and the rights of the transferee are perfect at law and in equity, as against all persons, except those who

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have some prior equity. In *Bates v. New York Insurance Company, supra*, the rights of the purchaser of the stock were protected against the corporation dealing with the original stockholder after notice of the sale, although the change of title before the payment of all the installments was prohibited. A purchaser without the prescribed formal transfer, takes the stock subject to any equitable claim which exists against it at the time in favor of the company, or any other person, and this is the express holding in the cases cited from the courts of our own State. Chancellor WALWORTH, in *Commercial Bank v. Kortright, supra*, says: "An agreement to transfer certain specified shares founded upon a good consideration, actually paid therefor, or an actual hypothecation thereof for the payment of a specified debt, but not intimated on the books of the company, although it does not transfer the legal title to the stock, is a good equitable transfer or hypothecation thereof, which will give to such assignee a preferable claim over any person who has not a prior equity, unless he has obtained a legal title to the stock by an actual assignment upon the books of the corporation, without notice of such equity. This is the maxim: that when the equities of the parties are equal, and neither has the legal title, he who is first in time is strongest in right. *Qui prior est in tempore potior est in jure*."

On the third day of January, 1854, the plaintiff became the equitable owner of this stock, absolutely entitled to it as against the original stockholder and the defendant, as the latter had no lien upon it or equitable title to it, and the legal title was not then, and has not since been, and is not now in the defendant. On that day he had a right to demand of the defendant, a transfer of the stock, and the defendant could not have refused. The demand was delayed until May, 1855, but had the plaintiff lost his title, or had the defendant acquired any title or any superior equity to that of the plaintiff? The legal title remained where it did in January, 1854, in the original stockholder, who was but the trustee for the party equitably entitled; the plaintiff's equities were without change, and the defendant at most had but an equity, and as between the two

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as the plaintiff's equity occurred before the defendant had any equity, it was necessarily prior in time, and therefore paramount to that of the defendant. Equities prevail in the order of time in which they occur. Broome's Leg. Max., 329. It is not necessary to say that had the defendant, after the sale of the stock to the plaintiff, dealt with the original stockholder upon the faith of the stock still remaining in his name on its books, and without notice of the transfer, it would not have been protected: there was no such dealing. The contract, which at the time of the transfer, was not a debt and raised no equity on behalf of the defendant without a new consideration, or the parting with any value by the defendant, became a debt against the original stockholder, and thus would have created an equitable lien upon the stock, had the title not been changed; but as an equitable title it was junior in time to that of the plaintiff, and it was attended by no circumstances which should entitle it to prevail against the plaintiff. The equitable lien attached only from the time of the existence of the debt, and could not by relation operate and take effect as of the time of the making of the contract out of which it arose, so as to overreach the title of the plaintiff. There is perhaps some confusion growing out of the consideration of the two sections of the charter—the one regulating the mode of transfer, and the other defining the rights of the shareholders—together. The first (§ 2 of Art 5) prescribes the mode of transfer solely to protect the bank in its recognition of the parties as stockholders, whose names appear as such. The other (§ 8 of same Art.) alone makes provisions for the pledge of the stock, for the debts of the shareholder, and in it no reference is made to any particular mode or form of transfer, but the prohibition is of any transfer that the law recognizes until the debts of the shareholder are paid. It prohibits alike the transfer which was made on the 3d of January, 1854, and which the law says was effectual to pass the title to the stock, and the mode of transfer prescribed for the security of the bank. Section three should be construed as if section two did not exist, and the transfer to the plaintiff was effectual from

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the time it was made, as against the defendant, and any equity it could thereafter acquire.

If the defendant has any lien, it arose upon and by reason of the protest of the Thompson note, and then the debtor W. E. Leggett was not a shareholder, and had no stock to pledge, or which was within the operation of the agreement in the articles of association. The agreement was only operative against shareholders, and it cannot be claimed that if W. E. Leggett had on the day of the Thompson note matured, executed a formal pledge of the stock to the bank, in security for its payment, any title would have vested on the defendant, and to me it seems very plain that an executory agreement in advance, that such pledge shall arise and exist from a given time, cannot give the party any better title. The clause in the charter gives no equity and creates no lien: it is the debt that creates the lien, and how that is to attach to a title that does not exist, that has passed away from the debtor, is difficult to be understood. At the most, it is but an executory agreement, that any stock he may own when he should become a debtor to the bank, should be bound for the payment of the debt. But when W. E. Leggett became a debtor, he was not a shareholder legally or equitably, and the agreement did not run with the stock, and bind it in the hands of a purchaser for a debt created or arising after the transfer. It should be borne in mind that there is no element of fraud which might overcome the equities of the plaintiff in the case: all is fair and both parties are *bona fide* claimants. The defendant is not entitled to succeed by reason of the weakness of the title of the plaintiff, for that was perfect on the 3d day of January, 1854, and has not been impaired since; and it cannot succeed on the strength of its own title, because it has no better title than the plaintiff, that is, it has not secured the legal title and its equities as junior in time must yield to those of the plaintiff, or which is the better and more correct expression, the defendant acquired no equities for want of any title in W. E. Leggett its debtor, upon which equities could attach. The appellant should show at what time, and by what means the plaintiff lost his title,

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which was indisputably good when he acquired it, and which he had done nothing to forfeit. A shadowy and vague equity resting upon several circumstances, neither of which alone, nor all together, constitute any tangible title, legal or equitable, ought not to prevail over a recognized and well-established legal right.

The judgment should be affirmed.

SELDEN, Ch. J., and SUTHERLAND, J., also dissented.

Judgment reversed and new trial ordered.

24	298
118	603
24	298
131	313

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On the cross-examination of a witness he cannot be asked whether he had been convicted of petit larceny, although he do not object. The party has a right to insist that the fact be proved, if at all, by the record. So also the party may object, though the witness do not, to a question whether the latter had made certain statements in an affidavit which was not produced.

THIS was an action of trover for a quantity of hay cut by the defendant, on premises owned by the plaintiff's intestate, John E. Newcomb, and carried off and converted to his own use. The referee gave judgment for the value of the grass or hay cut. The judgment of the referee was affirmed by the Supreme Court, and the defendant appealed to this court. Certain questions of evidence arose upon the trial, which are sufficiently referred to in the opinion.

James Gibson, for the appellant.

Joseph Potter, for the respondent.

ALLEN, J. One of the witnesses for the plaintiff was asked, on cross-examination, whether he had been convicted of petit

larceny in this State. The question was objected to upon several grounds, and, among others, for the reason that there was better evidence of the conviction. The objection was sustained, and the evidence excluded. The general rule is well settled that evidence by way of impeachment of the character of the witness for veracity must be confined to his general reputation, and that proof of specific acts cannot be given. The embarrassment that would arise from the number of collateral issues which might spring up in the course of a trial would alone constitute a serious objection to the admissibility of evidence to establish specific crimes against the witnesses. Another reason for confining evidence affecting the character of witnesses to their general reputation is, that every man is supposed to be capable of supporting his general character, but would not be likely to be prepared to answer particular charges without notice. (1 Greenl. Ev., § 461; 1 Phil. Ev., 291; Cowen & Hill's Notes, 580, p. 766.) These reasons are not controlling when the inquiry is made of the witness as to his own acts or offences, which he may well be supposed able to explain at any time, and when his answers are conclusive and preclude further inquiry, as is the case as to all collateral matters affecting his general credit, so that side issues cannot be made to embarrass the trial of the principal issue. A witness cannot be asked as to any collateral and independent fact, with a view to contradict him. (*Spencely v. De Willett*, 7 East., 108; *Lawrence v. Barker*, 5 Wend., 801; *Harris v. Nelson*, 7 id., 57; *Howard v. The City Fire Ins. Co.*, 4 Denio, 502.) In the latitude of cross-examination, and to enable the jury to understand the character of the witnesses they are called upon to believe, collateral evidence is allowed from the witness himself, tending to discredit and disgrace the witness under examination. The witness may be privileged from answering; but the question may be put, and, if the witness waive his privilege, answered, if the answer relate to the conduct of the witness and legitimately affect his credit for veracity. (1 Greenl. Ev., § 460.) The boundary and limit of such examination, is not well defined, and the cases may not be in

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harmony touching the principle upon which whatever of rule there may be rests, or the extent to which the rule should be carried in permitting a cross-examination as to independent, collateral acts of the witness affecting his moral character, or as to specific acts of criminality or crime. Here the question objected to did not call for a statement in explanation of any act of the witness; but it was sought to prove such conduct, and the guilt of the defendant, by proof of an independent fact, to wit, his conviction of the offence. Of that fact there was higher evidence, if it was admissible at all. It would be no answer to say that the record of conviction for a misdemeanor was not admissible in evidence for any purpose, if that were so. If the fact of conviction could be proved, the record was competent. The fact could not be made competent by proving it by inferior and secondary evidence. Prof. Greenleaf says (1 Greenl. Ev., § 457): "But, on the other hand, when the question involves the fact of a previous conviction, it *ought not to be asked*, because there is higher and better evidence which ought to be offered." If the question ought not to be asked, the objection cannot be referred to the privilege of the witness. It seems that proof of conviction for petit larceny was competent by way of impeachment. (*Carpenter v. Nixon*, 5 Hill, 260.)

Collateral issues form no exception to the general rule requiring the best evidence to be given; and there is no distinction between evidence to the competency and that to the credit of a witness. In both issues the party has the same interest, and is entitled to the same grade of evidence upon each; and, upon principle as well as upon authority, parol proof of the conviction was inadmissible. In *King v. The Inhabitants of Castell Careinion* (8 East., 77), it was held that a party, interested in a witness' testimony who was objected to on account of his having been convicted for felony and his imprisonment being unexpired, was entitled to insist on proof of such conviction by the record, though admitted by the witness himself. Lord ELLENBOROUGH says: "The evidence went to affect the rights of third persons, namely, the litigant

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parties. Whether or not the witness was convicted of the felony, would appear by the record; and it cannot be seriously argued that a record can be proved by the admissions of any witness. He may have mistaken what passed in court," &c. This case was cited and followed in *People v. Herrick* (13 John., 82), and in that case, as in others, the objection was taken by counsel for the prisoner, and not by the witness. Again, in *Hills v. Colvin* (14 John., 182), the precise objection, that the record was the only competent evidence of the conviction, was taken by the party, and the court held that he who would take exception to a witness on the ground of his conviction of a *crimen falsi*, must have a copy of the record of conviction ready to produce in court. Evidence that a witness had been indicted for perjury and forgery was excluded in *Jackson v. Osborn* (2 Wend., 555). The objection to the question was properly sustained and the evidence excluded.

The defendant, on the cross-examination of the same witness, asked, "Did you make oath, at same time and place, before Underwood, Master in Chancery, that you never had any conversation with Griswold, to your recollection, about Newcomb's cutting a portion of the grass of 1847, nor about any arrangement between them about cutting said grass?" The question was objected to for several reasons, among others because the affidavit was the best evidence; and the objection was sustained. The witness had before stated that he had not, "in words or in substance," so stated to or before Underwood at the time and place referred to; and the only variation in the question was as to his having made oath to such statement. The question had been sufficiently answered before, and was properly excluded for that reason. The defendant had the full benefit of the denial of the witness. But it was properly rejected, for the reason that the statement was in writing, and in the form of a deposition or affidavit, and should have been produced. A witness is not bound to answer as to matters reduced to writing by himself or another, and subscribed by him, until after the writing has been produced and read or shown to him. (*Bellinger v. People*, 8 Wend., 595.) The rule

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was held upon the trial of the Queen in the House of Lords (2 B. & B., 288), that a witness could not, upon cross-examination, be asked whether, in a certain letter written by the witness and in the hands of the examining party, he did or did not make certain statements, but that the letter itself must first be read. This objection was well taken.

The judgment of the court below should be affirmed.

SMITH, J., dissented.

Judgment affirmed.

24	302
155	521

BIDWELL v. THE NORTH WESTERN INSURANCE COMPANY.

A marine policy of insurance "upon the whole tackle," &c., of a vessel, containing a warranty that "the property is free from all liens," parol evidence is admissible that the property insured was the owner's equity of redemption in the vessel which was subject to certain mortgages known to the insurer.

The existence of such mortgages is no breach of the warranty.

APPEAL from the Superior Court of the city of Buffalo. Action upon a marine policy, which by its terms purported to be "upon the whole body, tackle, apparel and furniture of the good steamer Garden City," and in which it was "agreed that the property be warranted by the assured free from all liens," &c.

The plaintiff, who was a mortgagee of the vessel, procured the insurance "on account of Erastus Crocker," the owner, "loss, if any, payable to Vincent Bidwell," the plaintiff, to secure his interest as mortgagee. His object was communicated to the defendant at the time of issuing the policy, and the existence of two prior mortgages upon the boat was also known to the insurer.

On the trial the judge held that the warranty as to liens related to the entire title to the steamer, and was not confined to the interest insured, and that the existence of the mortgages

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at the time the insurance was effected, constituted a breach of that warranty. The plaintiff excepted. The court at general term ordered a new trial, and the defendant appealed to this court, stipulating for judgment absolute for the plaintiff, if the order should be affirmed.

John H. Reynolds, for the appellant.

John Ganson, for the respondent.

GOULD, J. This case comes up on a state of facts essentially different from that of the same case as reported in 19 N. Y., 179. It is now found (from evidence amply sufficient), that the plaintiff (and his partners) themselves procured this policy of insurance from the defendants, to protect their interest as mortgagees of the vessel, or rather Crocker's remaining interest therein, after the two prior mortgages. That at the time the insurance was applied for and made, the defendants had full knowledge that the interest of Crocker in the vessel was that of the owner subject to the said prior mortgages, that the insurance was of such interest, and that the defendants knew at the time the contract of insurance was made, and the policy was delivered, the nature and extent of Crocker's interest and knew of the existence of the three mortgages aforesaid.

This state of facts would seem properly proved in the case within the decision in 19 N. Y., 182, that "there is much greater latitude in applying a policy of insurance to the interest intended to be covered, than in other written contracts." When not contradictory to the terms of the policy, it may be shown "*whose property* it was intended to cover;" and (with the same limitation) what property or interest it was intended to cover. And since the words "the *whole*," &c., of the vessel are properly explainable as meaning that the whole title is technically in the one owner (as distinguished from an owner of a fractional part), so the "property insured" may be shown as a fact, by evidence.

If this be so, then there is no breach of the warranty against liens on the interest insured. And the company remains

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liable just as it agreed to be, and for just what it agreed to be. Indeed it is not easy to perceive why an insurance company, by reason of the formal words or clauses (of a general and comprehensive nature), inserted in a policy intended to meet broad classes of contingencies, should ever be allowed to avoid liability on the ground that facts, of which the company had full knowledge at the time of issuing the policy, were then not in accordance with the formal words of the contract, or some of its multifarious conditions. If such facts are to be held a breach of such a clause, they are a breach *eo instanti* of the making of the contract, and are so known to be by the company as well as the insured. And to allow the company to take the premium without taking the risk would be to encourage a fraud. It would, as a legal principle, be equivalent to holding that a warranty of the soundness of a horse is a warranty that he has four legs, when one has been cut off.

The decision of the general term of the Superior Court of Buffalo should be affirmed, and judgment final should be given for the plaintiff.

SELDEN, Ch. J., and ALLEN, J., did not sit in the case; all the other judges concurring,

Judgment affirmed.

CAMPBELL *et al.* v. WOODWORTH *et al.*

An assignment in trust for creditors is not rendered void by a provision giving the assignees (one of them being a lawyer) "a just and reasonable compensation for labor, time, services, and attention," in the business of the trust.

This language is to be construed as meaning no more than the commissions fixed by law.

APPEAL from the Supreme Court. The question is fully stated in the following opinion.

Campbell v. Woodworth.

George W. Parsons, for the appellants.

Henry R. Selden, for the respondents.

DAVIES, J. A single question is presented for our consideration in this case. It is whether an assignment containing the following clause is in law fraudulent and void. The clause objected to is in these words: "To pay all expenses which may necessarily be incurred by my said assignees in the execution of the trusts thereby created, including the charges for drawing the assignment, together with a just and reasonable compensation for labor, time, services and attention of the said James C. Campbell, Francis E. Chapman and Justus Yale (the assignees), by them actually done, spent, performed, given or applied in and about the trusts and the business thereof committed to them." Campbell, one of the assignees, is a lawyer. It is urged on the part of the appellants that this provision is obnoxious to the objection, that it provides a rate of compensation to the assignees beyond that allowed by law, and several cases in this court are relied upon to show its invalidity.

Barney v. Griffin (2 Comst., 865), is supposed to be an authority to show that the provision under consideration renders the assignment void. The decision in that case was put distinctly on other grounds. And the reasoning of the judge who delivered the opinion would only go to the extent, not of avoiding the deed *in toto*, because it provided for an excess of compensation to the assignees beyond that allowed by law, but avoiding it only for such excess. This case cannot, therefore, be claimed as an authority for holding that the clause under consideration (even though, as is argued by the appellants' counsel, it in terms provides a compensation for the assignees greater than that allowed by law), would render the present assignment void. In *Nichols v. McEwen* (17 N. Y., 22), this court held an assignment void which contained a provision providing for compensating the assignee, who was a lawyer, for all "his expenses, costs, charges and commissions, together

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with a reasonable counsel fee." It was only the provision for the payment of a counsel fee which received the condemnation of this court, and the allowance to the assignee for all his expenses, costs, charges and commissions, was deemed unobjectionable. Does the assignment in the present case authorize the assignees to retain more than was deemed lawful in *Nichols v. McKuen*? The compensation or commission which the law allows, is for the labor, time, services and attention of the assignees actually done, spent, given and bestowed in and about the business of the trust created. It is for the performance of these services that the law has fixed a certain rate of compensation which is denominated as commissions, and has adjudged that such rate of compensation is just and reasonable in all cases. It is obvious that the amount of labor, care and attention in each case of a trust must be different. In some very onerous, in others comparatively light. Yet the law, in fixing the compensation of the assignee, has determined that it shall be ascertained by a fixed rule, being a per centage on the amount collected and paid out. And this per centage it declares in all cases to be a just and reasonable compensation. The court cannot fail to see that in some instances it is neither just nor reasonable, in reference to the labor performed and the responsibility assumed by the assignee, while it is equally clear that in other cases it is also neither just nor reasonable, as being greatly in excess of a proper compensation for services actually rendered. Yet we are bound to regard this per centage as the just and reasonable compensation in all cases, and therefore when the present assignor declared that the compensation to be allowed to his assignees should be a just and reasonable one, he did no more than say it should be a legal compensation, such compensation as that fixed by law for the performance of the duties imposed and the services to be rendered. The language used does not warrant the implication that any other compensation is provided for, than such as is authorized by law, and which has frequently received the sanction of the courts in this State.

Howland v. Edmonds.

The judgment appealed from should therefore be affirmed, with costs.

SUTHERLAND, J., also delivered an opinion for affirmance.

All the judges concurring,

Judgment affirmed.

HOWLAND, Receiver, &c., v. EDMONDS *et al*, Executor, &c.

A note given to a mutual fire insurance company, organized under the general law, as one of the notes required by the statute (chap. 308 of 1849) to make up its capital, is, in legal effect, payable on demand, *i. e.*, *at its date*, though by its terms payment was to be made at such times and in such portions as the directors might require.

No actual demand is necessary in respect to such a note. The statute under which it is given fastens on it the character of a note payable absolutely, or at the mere will of the holder.

The statute of limitations begins to run against such a note at the time it is given, and is a good defence at the expiration of six years from that time.

APPEAL from the Supreme Court. Action to recover the amount of a promissory note made by the defendants' testator, in the following words: "For value received, in policy No. 256, dated October 27, 1849, issued by the New York Protection Fire Insurance Company, I promise to pay the said company, or their treasurer for the time being, the sum of five hundred and eighty dollars, in such portions, and at such time or times as the directors of said company may, agreeably to their act of incorporation, require."

The insurance company mentioned in the note was organized pursuant to the general act of 1849 (ch. 308), in the month of October, in that year, and was located at Rome, in Oneida county; and the note sued on was one of the original notes given to make up the sum of one hundred thousand dollars, required by the fifth section of the general act, to be given in

24	307
120	248
24	307
127	63

24	307
154	468
24	307
167	304

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advance for premiums as the capital of the company. The company became insolvent in August, 1853, and the plaintiff had been appointed its receiver by an order of the Supreme Court. He commenced this action in June, 1860, having a few days before demanded payment of the note of the defendant, the executor of the maker. The defence was the statute of limitations, the defendants insisting that the note was, in effect, payable on demand. The plaintiff maintained that the action did not accrue until the actual demand of payment, shortly before the suit was commenced; and the court being of that opinion held that the action was not barred by the statute, and gave judgment for the plaintiff, and the defendants appealed.

Addison C. Miller and *Ward Hunt*, for the appellants.

Henry R. Mygatt, for the respondent.

DENIO, J. The general principles involved in this question are very well established. A note payable by its terms, on demand, may be prosecuted immediately, the suit itself being a sufficient demand; and if any other similar expression be used, as on request, or, on being called on, the law is the same, and no demand before suit brought is necessary. (*Wenman v. The Mohawk Insurance Company*, 13 Wend., 267; *Norton v. Ellam*, 2 Mees. & Welsb., 461; *Waters v. Thanet*, 2 Adolph. & Ellis, N. S., 757.) On the other hand, if the defendants' liability depends upon the performance of a condition precedent, it is very plain that no action will lie until it be performed; and a request or demand of the thing claimed may, and frequently does, constitute such a condition to the obligation of the defendant. When that is the case, such demand, before suit brought, must be averred and proved to enable the plaintiff to maintain the action; and inasmuch as the cause of action must have accrued before the statute of limitations can commence to run, six years must, in these cases, have elapsed after the making of the demand before the

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statute bar will attach. Where the thing promised is the payment of a sum of money, no actual demand will, in general, as we have said, be necessary, notwithstanding the terms of the contract; but it is nevertheless in the power of the parties so to frame their engagements as to make a preliminary demand essential. And so likewise though there be nothing in the terms of the instrument to take the case out of the general rule, the attending circumstances, and the nature of the duty may be such that the words which mention a demand or request, will have a special significance, and will require a preliminary demand to be made. An instance of the first description occurred in *Thorpe v. Booth* (Ryan & Moody, 888), where a note was payable twenty-four months after demand, and it was held that the statute did not begin to run until a demand was made, and the time mentioned had elapsed. Of the instances in which it is held, that the nature of the debt or demand for which the note was given, imparts character and significance to the language respecting the request, the case cited from 3 Pen. & W., 149 (*Sinkler v. The Turnpike Company*), is a sufficient example. By the instrument which the defendant had signed, a sum of money was payable "in such manner, in such proportions, and at such times as should be determined" by the President and managers of a certain Turnpike Company in pursuance of an act of the General Assembly. It was held, that the statute of limitations did not begin to run, until a call had been made upon the subscribers pursuant to the statute; but this was upon the ground that, by the act, the managers were to arrange the stock into instalments, and call for the money as it might be wanted during the construction of the road. It provided, in express terms, that no action could be maintained on the subscription, until the managers had first fixed a time for payment, and given notice of it. The cases of *Miles v. Bough* (3 Adolph. & Ellis, N. S., 845), and *Ross v. The La Fayette R. R. Co.* (6 Ind., 299), proceed upon the same principle. The law is the same as to the notes given to mutual insurance companies having charters similar to that of the Jefferson County Company,

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incorporated in 1836 (p. 42, § 6). In respect to those companies, the statute provided that the notes should be payable (except as to the 5 per cent required to be paid down) "in part, or in whole, at any time when the directors shall deem the same requisite, for the payment of losses by fire," &c. And so also as to notes given upon effecting insurance in the companies incorporated under the act of 1849, where they were organized as they generally were, upon the system of premium notes, assessable for the payment of losses and incidental expenses. All these notes were given in the same language as the one before us, the form of which was no doubt borrowed from them, yet it was always held, according to the obvious intention of the transactions, that no action could be maintained upon them unless an assessment had been first made. The case of *Savage v. Madbury* (19 N. Y., 32), was an action brought in this court upon a note given to one of these companies, upon the taking out of a policy of insurance by the maker, and was in the same language as the note now under consideration, and there had been no assessment. It appeared, upon an examination of the charter and by-laws of the company, that it was organized upon the system of premium notes, assessable for losses, and it was held that the plaintiff could not recover for the want of an assessment. In these cases, the circumstances outside of the notes, and connected with their consideration, attached a meaning and purpose to the peculiar expressions contained in them. Those circumstances, looked at in connection with the terms of the notes, showed that they were not made for the absolute payment of the sum of money mentioned in them, or for any sum, but as an engagement to pay a proportion of the losses which might belong to the makers to pay, not exceeding the nominal amount mentioned in the notes, when an assessment for that purpose should be made by the directors. But suppose a note in the same precise language should be given upon the simple loan of a sum of money by an insurance company authorized to loan money and to take notes, would the language which refers to the requirement of payment by the directors have altogether a different

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meaning than the words *on demand*, contained in ordinary promissory notes? I know of no reason for any distinction between the two cases. The principle of the authority holding that these words in a note given for the payment of money do not create a condition precedent is, that the time for requiring payment is left to the uncontrolled will of the creditor. When that is found to be the case no condition is created by a statement that the money is payable on demand or on request, or when required by the creditor, or where the language contained in this note is used,—an action being considered in all such cases as a sufficient request.

The present action is founded upon the assumption that the note was payable absolutely and that no assessment was required. Upon a contrary supposition the defendant would be entitled to judgment for the want of an assessment, according to the case of *Savage v. Medbury*, just referred to, which would be a precise precedent for such a judgment. The plaintiff himself therefore contends that the exceptional language of the note did not create any condition other than that the payee might require the payment in whole or in part at its pleasure. This is a condition which, in strictness of language, is contained in every note payable on demand. The maker may be said to promise to pay the money mentioned, provided the payee shall demand it, and whenever he shall make such demand; but this is a condition in form only, and not in substance or legal effect.

The plaintiff is quite correct in assuming that the money was payable absolutely, and that no assessment was necessary. We had occasion to examine that question with care, in *White v. Haight* (16 N. Y., 310). Looking to the purpose for which these notes were given, and to the language of the statute requiring them, we came to the conclusion that they were intended to be securities for the sums of money mentioned in them, in the same absolute sense as though money had been paid into the company as capital, and it had been loaned out by them on the notes. The consideration of the notes, it is true, was the agreement on the part of the company, to insure the parties

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or their nominees to such an aggregate sum, as that the premiums would amount to the money mentioned in the respective notes. When therefore the maker of one of the notes should have paid to the company the amount named in it, he would be entitled to take out policies in his own name or for other parties until the amount he had paid in satisfaction of the note had been allowed in premiums. So any premium which he should in fact pay upon insurances obtained from the company, would at the same time be a payment on account of his note. If there were no other parties interested but the makers of the note and the corporation, the former ought to be discharged from the payment when the company should have failed before insurances had been taken on account of the note. But this would defeat the purpose for which they were given, which was to furnish a safe capital for the indemnity of all parties dealing with the company on the subject of insurance. It was to protect the insured parties from the consequences of such failure of the company that the notes were required to be given, before a company was allowed to go into operation. That purpose would of course be entirely defeated, and the whole plan would become illusory, if upon the insolvency of the company, the notes in which the capital was invested, or which stood in the place of capital, should all be void for a failure of consideration. So far as the makers of the notes had absorbed their respective amounts in premiums actually paid before the failure they would be satisfied, and the company would be possessed of the profits realized upon that business; and this the legislature seems to have thought would in such a case be a sufficient capital, and so also if the notes had been paid without any insurance having been effected by the makers. If the notes remained on hand, not extinguished by the payment of premiums or otherwise, they were to stand in the place of capital, and to be available for the payment of losses or otherwise. The plan of obtaining the notes of others in advance, in consideration of engagements to insure them when they should thereafter call for insurance, was a device resorted to some years before the passage of the act of 1849,

in the charters of a number of mutual insurance companies granted by special statutes, principally in the city of New York, as was explained in the opinion of the court in *White v. Haight*. The system was the same in all these cases. The notes were to be given for premiums in advance of the actual issuing of the policies, and were to constitute a sort of capital for the security of the dealers, and were to be payable at all events whether the maker obtained insurance or not, and although the company should fail and go into the hands of a receiver. The obligation to make payment in such cases was fully settled in this court in *Deraismes v. The Merchants' Mutual Insurance Company* (1 Comst., 371), and in *Brown v. Crooke* (4 id., 51); and no other idea could be entertained consistently with giving any fair scope to the obvious intention of the system. The note under consideration therefore was an absolute and unconditional obligation to pay the money mentioned in it when, by its legal effect, it should mature. It was such a note as might rightfully be received in establishing the company, for although not in terms payable within twelve months as the fifth section requires, it was payable on request, which the law construes to mean immediately if such be the pleasure of the holder. The directors, whose determination as to the time of payment is mentioned in the note, were, as the governing power of the corporation, the holder of the paper; and the statement, that the money should be payable at such time as they might require, was in effect a provision that it should be paid on the demand of the payees. It is therefore to be governed by the law which declares that notes payable on demand may be sued at any time at the election of the holder. The statement that it might be called for in different portions or instalments, was for the purpose of enabling the company to require the payment in that way; but I think no question arises upon that feature inasmuch as no demand was at any time made for any part of the money less than the whole. The parties, it seems probable, adopted a form for these notes not entirely appropriate to their object; and it is certainly possible that the want of an accurate perception of the purposes of

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the act, in requiring them to be given, led them to assume an engagement for the payment of money absolutely, when they supposed they were only undertaking to pay a proportion of the losses, according to the theory of the Jefferson county act. If the language of the notes would not fairly admit of any other construction than that, the signers would not be liable in this action; for whatever might be the requirement of the act they could not be held beyond the fair meaning of the terms of the contract actually made by them. But there is nothing in the language of the note to qualify the effect of the absolute engagement to pay the whole amount of money mentioned in it when the proper officers of the corporation should call for it. The most which can be said is that, taking into consideration the history of mutual insurance companies and the terms of the notes used where a guaranty as to losses only was intended, there is a fair ground for conjecturing that the defendant may have understood his engagement as amounting to such guaranty and nothing more. But as the language used can, without any violence, be accommodated to the case of an absolute undertaking payable on demand, and as that was the exigency under which this contract was made, the law requires that construction to be given to it and will not admit of any other.

Considerable reliance is placed on the expression in the fifth section of the general act to the effect that the notes therein mentioned shall be considered a part of the capital stock of the company. The plaintiff's counsel argues from this, that they are to be assimilated to the capital stock of other corporations in the quality of permanency, and that the intention must therefore be to have them kept on foot during the whole period of the company's existence except so far as portions of their amount may be needed for the payment of losses. Hence, it is inferred that they cannot be considered as instruments payable on demand which may be collected immediately. The argument, if otherwise well founded, would prove too much, for on that assumption it would be incumbent on the plaintiffs to show the extent of the losses which policy holders had suf-

Howland v. Edwards.

ferred in order to determine what portion of the amount should be collected. But the proper answer is that the term capital stock is used in this place instead of capital, the meaning being that the notes shall be considered in the light of contributed capital or funds, to be employed for the purposes for which the money paid in by the stockholders in other companies is used. Ordinarily we understand by the capital stock of a corporation the interest of the shareholder, represented by the scrip or stock certificates, and the money which they pay to acquire that interest is the capital of the corporation. But the expression, 'capital stock' is frequently used in a general sense to denote the funds possessed by the institution, upon which it transacts its business, in the same manner in which we speak of the capital of a merchant, which is frequently called his stock in trade, or his capital stock. It is this sense in which it is used in the sentence referred to. For instances of the same kind, see *Laws of 1857*, ch. 465, § 8; *Onwego Starch Factory v. Dalloway* (21 N. Y., 455), and *The People v. The Bank of the Commonwealth* (23 N. Y., 192, 219).

It remains only to notice one or two cases which were referred to in the discussion of this case in the Supreme Court. In *The Golden Turnpike Company v. Hartin* (9 John., 217), the action was upon a promissory note, by which the defendant promised to pay the plaintiffs one hundred and twenty-five dollars for five shares of the capital stock of the plaintiffs' corporation "in such manner and proportion, and at such time and place as the plaintiff should from time to time require." There was no averment of any call by the directors, or other determination by them respecting the payment of the amount, or any part of it, or of any special demand. The defendant interposed a general demurrer, and judgment was given for the plaintiff. It is impossible, I think, to point out any difference of principle between that case and the present, as to the point under consideration; and the opinion of the court appears to me to show that this point was deliberately considered. They say, "The note was payable in money and payable absolutely and not depending on any contingency. It was in effect pay-

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able on demand," &c. The argument of the present plaintiff is that the note now in question was not absolute—that it required action on the part of the board of directors to create an obligation to pay it, and that it was not therefore payable on demand but on a condition. The argument in the case cited appears to have been that the instrument was not a promissory note, not being paid absolutely, but on a contingency, that the amount was only payable as it should be called for by this company; to which the court responded that it was not so, but it was a promissory note payable on demand. *The Dutchess Manufacturing Company v. Davis* (14 John., 238), was an action on a subscription to the stock of the plaintiffs' company, payable in such manner and proportions, &c., and the declaration set forth regular calls for instalments of the stock made by the trustees. The plaintiffs recovered and the judgment was sustained by the court. The case is supposed to favor the views of the present plaintiff, because averment of the making of calls was considered necessary by the plaintiff, and there was no intimation that it was not essential. But the general act for the incorporation of manufacturing companies, under which that company was incorporated, made the subscriptions payable by instalments upon the call of the trustees (1 R. L., p. 250, § 5), and the case therefore belongs to the same class with *Thorp v. Booth*, and *Sinkler v. The Turnpike Company*, which have been referred to, and is distinguishable from the present case.

It follows from these considerations that the statute of limitations furnished a bar to the present action, and that the judgment of the Supreme Court to the contrary ought to be reversed, and a new trial awarded.

ALLEN, J., who had dissented in the court below, read his opinion there delivered (reported in 33 Barb., 433), as containing his reasons for reversal; all the other judges concurred, except SUTHERLAND, J.

Judgment reversed and new trial ordered.

 Davis v. Pattison.

DAVIS v. PATTISON.

The carrier of a boat-load of wheat lost or converted a portion of it, and discharged the residue into a barge provided by an intermediate consignee for transporting it to its ultimate destination. The intermediate consignee refused to pay freight for the quantity delivered, unless the carrier would allow and deduct the value of the wheat lost. *Held*, that no contract to pay the freight was to be implied under these circumstances, and that an action therefor would not lie against the intermediate consignee.

An intermediate consignee is, in virtue of that character, authorized to adjust and receive damages from a loss of part of the property.

The rights and duties of intermediate consignees discussed, *per* ALLEN, J.

APPEAL from the Supreme Court. Action to recover the freight upon a quantity of wheat transported by canal from Oswego to Troy, by one Davis, and there delivered to the defendant, under this bill of lading:

"OSWEGO, Nov. 11, 1856.

"Received, of John Van Buren, Jr., on board boat C. A. Myers, of Whitesborough, whereof L. Davis is master, the following property, in good order, to be delivered in good order, as addressed in the margin, without delay:

"Acc't L. A. G. B. Grant, Care Grant, Armstrong & Co., New York, and E. C. Pattison, Troy.	"3,700 bushels Wheat, Freight hence to New York, 16 cts. " " " Troy, 12 cts. E. C. Pattison, collect and pay Capt. twelve cents per bushel, less one hundred dollars advanced."
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Upon the trial these facts were proved: The plaintiff's assignor, Capt. Lewis Davis, received on board of his canal boat, at Oswego, from one Van Buren, 3,700 bushels of wheat, to be carried to the defendant, at Troy. Capt. Davis delivered on board of the defendant's barge, at Troy, 3,670 bushels only: the residue, being thirty bushels, he had either converted to

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his own use or lost. The defendant did not know of this deficiency until the cargo of wheat had been measured out from the canal-boat into the defendant's barge. Upon the deficiency being ascertained, the defendant offered to pay the freight of twelve cents a bushel, less the one hundred dollars which had been advanced on account thereof at Oswego, if Capt. Davis would deduct therefrom the value of the thirty bushels short. Capt. Davis refused to make the deduction, and the defendant refused to pay him unless he would do so. Thereupon Capt. Davis assigned his claim for the freight to the plaintiff, and this action was brought to recover the freight on the 8,670 bushels delivered, less the one hundred dollars advanced. The defendant offered evidence of a tender of the freight for the quantity of wheat delivered, deducting the value of the thirty bushels lost, which was rejected, and the defendant took an exception. He also excepted to the judge's refusal to nonsuit the plaintiff. The jury, under the direction of the judge, found a verdict for the plaintiff, upon which judgment was entered, which having been affirmed at general term in the fifth district, the defendant appealed to this court.

Francis Kernan, for the appellant.

Montgomery H. Throop, for the respondent.

SUTHERLAND, J. I think the action cannot be maintained. I think the question is precisely the same as if the defendant had been the ultimate consignee of the cargo of wheat. As to the plaintiff's assignor, and his remedy for his freight, the defendant was the ultimate consignee. If the action can be maintained, it must be on the ground of an implied contract on the part of the defendant to pay the freight. This contract must be implied from the acts of the parties in delivering and accepting the cargo. I think the implication is repelled by the circumstances of the case. No doubt a common carrier has a lien on the property carried, for his freight or charges. (§

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Kent's Com., 221, 222.) Had Capt. Davis delivered to the defendant, and the defendant accepted, the whole 8,700 bushels, I assume, at least for the purposes of this case, that the law would have implied a contract on the part of the defendant to pay the freight, although the bill of lading did not contain the words or condition, "*he paying the freight*." But it can hardly be said that the defendant did accept the 8,670 bushels, in the sense in which the counsel for the plaintiff says the defendant accepted, and insists upon his acceptance as implying a contract. He must be supposed to have consented to the transferring of 8,670 bushels from the canal-boat to his barge, supposing that there was 8,700 bushels, according to the bill of lading. The law charged the loss of the thirty bushels upon Capt. Davis; and, in the absence of any explanation of the loss, he must be supposed to have known of the deficiency before he commenced transferring the wheat from the canal-boat to the barge. He should have informed the defendant of it before he commenced the transfer, if, waiving his lien, he meant to look to the defendant for his freight, on the ground of the transfer and acceptance. Had he done so, we must infer, from the conduct of the defendant immediately upon ascertaining the deficiency, that he would not have permitted the transfer unless Capt. Davis had agreed to deduct from the freight the value of the thirty bushels short. To allow a contract to be implied on the part of the defendant from the delivery and acceptance of the 8,670 bushels under such circumstances, is not only forbidden by the conduct of the defendant immediately upon being informed of the loss, but would permit Capt. Davis to take advantage of his own wrong. The defendant's offer was fair and reasonable. Capt. Davis should have made the deduction, and received his money. If the defendant should be regarded as the mere agent of the owner to take charge of and forward the wheat from Troy to New York, I think he had authority to make the offer.

The judgment of the Supreme Court should be reversed, and a new trial granted.

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ALLEN, J., referred, for the grounds of his judgment, to his dissenting opinion in the court below, which was as follows:

The principles by which the rights and obligations of consignees of property at intermediate ports of transshipment are governed, can hardly be said to be entirely settled by adjudications.

The prosecution of the inland navigation of the country, with its frequent transshipments, gives rise to many questions unknown to commerce heretofore, and the interests of trade may possibly require a modification of some of the rules which, under different circumstances, have been found all-sufficient to protect the rights and interests of property owners as well as the shippers. At all events, before an adjudication is made which will jeopard the interests of any class concerned in the inland commerce and navigation of the country in obedience to adjudications based upon a strictly marine contract, it should be seen that the case is technically within the rule established. Assuming, without deciding, that the party to whose care, at an intermediate port, the property is addressed, to be transhipped and forwarded to the owner or ultimate consignee, is, upon the receipt of the goods, and in the absence of any provision, express or implied—except as a provision may be implied from their receipt—liable personally to the carrier for the freight and charges, the question in this case will be as to the extent of the rights with which he is clothed in behalf of the owner. Ordinarily, a person acting as agent, and whose agency is disclosed in the transaction, is not liable upon his contracts made within the scope of his agency. He merely binds the principal, and, if a liability is created in this case, it is an exception to the general rule; adopted for the convenience of commerce. The ultimate consignee is presumed to be the owner; and, whether he is or not, he is liable for the freight of property received under a bill of lading directing the goods to be delivered to him on payment of freight. (8 Kent's Com., 221; *Cock v. Taylor*, 13 East., 399; *Dougal v. Kemble*, 3 Bing., 383.) But it is not every case of the receipt of goods, even under a bill of lading, that makes the recipient liable for the

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freight, simply by reason of such receipt. (*Wilson v. Kymer*, 1 M. & S., 157; *Moors v. Kymer*, 2 id., n., 303; *Ward v. Felton*, 1 East., 507; *Barker v. Havens*, 17 John., 234; *Amos v. Temperly*, 8 M. & W., 798; *Tobin v. Crawford*, 9 id., 716; *Collins v. Union T. Co.*, 10 Watts, 384.) The whole law upon this subject is reviewed in *Sanders v. Vanzeller* (4 Adol. & Ellis, N. S., 260).

But I think we are not precluded by any adjudged case from considering the right of the "intermediate consignee" to call upon the carrier to perform the contract made by him for the delivery of the goods to such consignee, as well upon principle as upon authority.

That the "intermediate consignee" of the cargo could recoup for damages to that portion actually delivered and accepted, or for any portion which was missing and had been lost by the act of the carrier, there can be no question. *Shields v. Davis* (6 Taunt., 65), decides that a consignee cannot defend himself, in an action for freight upon goods which he has accepted, on the ground that the goods have been damaged in the carriage. The defence was urged upon the ground that the safe delivery of the goods was a condition precedent to the claim for freight, and this claim was overruled by the court. It was not, however, held that, by the acceptance of the goods, the consignee waived his claim for damages for injuries occasioned by the negligence of the carrier, and the right of set-off or recoupment was not raised or passed upon.

The right of the consignee in certain cases to bring an action for goods lost, is well settled. In *Evans v. Marlett* (1 Ld. Raym., 271), it is said: "If goods by bill of lading are conveyed to A, A is the owner, and must bring the action against the master of the ship, if they are lost. But if the bill be special, to be delivered to A to the use of B, B ought to bring the action. But if the bill be general to A, and the invoice only shows that they are upon the account of B, A ought always to bring the action, for the property is in him, and B has only a trust, *per totam curiam*."

When the consignee has a special property in the goods, he

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can always maintain an action for their conversion or for any injury to them. (*Fitzhugh v. Wiman*, 5 Seld., 559.)

As a general rule, a suit founded upon the express contract contained in a bill of lading should be brought by the shipper with whom the master contracted, or by the owner of the goods in a case where the shipper acted as his agent. But a consignee or indorsee of the bill of lading may, as such, acquire an interest in the goods without a transfer of the contract contained in the bill. (*Dows v. Cobb*, 12 Barb., 810; *Sargent v. Morris*, 3 Barn. & Ald., 277.) But the question is not necessarily in whose name an action would properly be brought for the value of the wheat not delivered by the carrier. The defendant was consignee of the property, *quoad* the plaintiff's assignor, and a delivery of the property to him at Troy terminated the carrier's duty in respect to it, and discharged him from all liability as a carrier. So far as the plaintiff's assignor was concerned, the defendant was the ultimate consignee; for his contract for the carriage of the goods terminates with a delivery to him: he had no interest in their future or ulterior destination. He received them in his own right as carrier or as consignee in trust for the owner, or as the agent for the true owner. If he owned them, or was trustee for the rightful owner, then, within the case of *Evans v. Marlett*, being the consignee, he could maintain an action for the portion lost, or recoup the value thereof in an action for the freight. (Code, § 150.) It is assumed, however, that he was merely the agent of the owner to receive, pay charges, and forward or sell the property. This being so, the acceptance of the property by the agent was an acceptance by the owner, and an action would lie against the owner upon the assumpsit implied from the acceptance. The fact that the law gives an action against the agent, if it does so, when acting and receiving goods as consignee, does not discharge the principal. (*Shephard v. De Bernales*, 18 East., 508; *Barker v. Havens*, *supra*.) The carrier had his election to retain the property until payment of freight, or, having waived this right and delivered it, to look to the consignee-agent, or his principal. If the action had been against

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the principal, the doctrine of recoupment would apply; and it is not reasonable that his rights and remedies against the agent should be greater or more beneficial than those against the principal. But, aside from this consideration, and upon principle, I think the agent consignee has a right to withhold from the carrier an indemnity for injury to and loss of property, a part of the cargo for which freight is demanded. There is, in truth, due him from the consignee or other owner of the goods the freight, less the amount by which the owner has been damaged by the failure of the carrier properly to perform his duty. (*Campbell v. Thompson*, 1 Stark., 490.) In that case, the master had sold a part of the cargo without authority, and Lord ELLENBOROUGH held that the owner of the goods was entitled to set off the value against the freight, notwithstanding the freight had been assigned to a stranger. Now, payment by the agent, although in consequence of a liability resting upon him by reason of his position, is a payment by the principal. Upon the theory of the counsel for the plaintiff, the principal could not defend himself against the claim of his agent to be reimbursed the amount paid, notwithstanding it was not due the carrier or collectable by him of the principal directly. The carrier certainly had no lien upon the goods beyond the amount which was properly payable by the owner, but, upon payment of a larger sum by the agent, the goods are, in his hands, subject to a lien for the larger sum. Thus the carrier is made to transfer to the agent a greater interest in the property than he himself had. It would seem that an agent for an absent principal, who would voluntarily pay freight for the portion of the cargo delivered, with evidence before him that a portion not delivered had been abstracted and disposed of by the carrier, and leave the principal to the pursuit of a hopeless remedy against a canal-boat proprietor, would be wanting in fidelity to his employer. The case might be somewhat different in result, if not in principle, if the freight claimed had been earned in a maritime voyage; where "the ship would be bound to the cargo" upon the bill of lading.

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Upon the case, as made upon the trial, the master of the boat, the plaintiff's assignee, had appropriated to his own use thirty bushels of wheat. The owner of the wheat could waive the tort and bring assumpsit for its value. It was, in fact, so much paid upon the freight. The owner of the wheat was only chargeable with the balance, and it is not easy to see how a person could be compelled to pay a greater sum than was equitably due the plaintiff upon the contract. The plaintiff could compel, in this way, the owner to pay a much larger amount than could have been collected of him had he received the goods in person and not by his agent.

Public policy, the interests of commerce, and the security of those doing business upon the canals, require that the intermediate consignees for transshipment, when charged with the payment of freight and charges, should be permitted to protect the interests of their principals, in whose stead they act. This authority must be inferred, otherwise the owners of property transported in part upon the canal and transhipped at intermediate ports will hold their goods by a very slight tenure, depending entirely upon the honesty and responsibility of the boatmen.

The contract is really an entire contract for the transportation of the whole quantity of wheat shipped; but if any part of it is lost by the perils of the voyage, for which the carrier is not responsible, and the residue is delivered and accepted, though freight cannot be apportioned, it will be held so far divisible as to allow, in furtherance of justice, a recovery of the freight already earned. But this principle will not interfere with the rights of the shipper or owner of the property under the same contract or bill of lading.

The principles laid down by McKissock, J., in *Hinsdale v. Weed* (5 Denio, 172), are founded in justice, and are not inconsistent with the decisions of our courts or any established rule of law. Judge WHITTLESEY finds another reason for arriving at the same result, but does not dissent from the views of Judge McKissock. They agreed that the owners of a vessel or boat could recover on an implied assumpsit against the con-

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signee named in the bill of lading, on his receiving the property shipped, and that, if part of the property be lost in the course of the voyage and the consignee accept the residue, he becomes liable to pay freight *pro rata*; and Judge McKISOCK holds that the consignee may recoup the damages on account of the property not delivered, in an action against him for the freight.

I am of the opinion that the judgment should be reversed, and a new trial granted, costs to abide the event.

All the judges concurred with both opinions.

Judgment reversed, and new trial ordered.

NEUSBAUM v. KEIM *et al.*

A judgment by confession is valid as between the parties, though the statement on which it is founded does not conform to the Code in setting forth the origin and particulars of the indebtedness.

Such a judgment, therefore, upon proof of its *bona fides*, authorizes the creditor to impeach a fraudulent transfer by his debtor.

A statement, it seems, is sufficient under the Code, which, after declaring that the plaintiff had sold and delivered to the debtor large quantities of meat in 1854 and 1855, averred that there was justly due him, upon such sales, a balance of \$2,114, with interest from January 18, 1855.

APPEAL from the Common Pleas of the county of New York. The plaintiff was nonsuited at the trial, upon a state of facts which sufficiently appears in the following opinion. The judgment dismissing the complaint was affirmed at general term, and the plaintiff appealed to this court.

Francis Byrne, for the appellant.

G. M. Spier, for the respondents.

DENIO, J. The plaintiff obtained a judgment by confession, without action, in May, 1855, against Keim, for \$2,120.25.

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In March previous, Keim conveyed the real estate in question to the defendant, Chamberlain, and Chamberlain at the same time conveyed it to the wife of Keim. These transfers the plaintiff alleges to be fraudulent; and he seeks in this suit to have them declared void and to set them aside. It is well settled that he must be a judgment-creditor in order to be entitled to this relief. At the trial, he offered in evidence the roll or record of his judgment. Objection being made thereto, on the ground that the debtor's written statement or confession of the demand did not comply with the provisions of the Code, the judge sustained the objection, and ruled that the judgment was void on that ground. An offer to prove the consideration and *bona fides* of the debt was also overruled; and the plaintiff was nonsuited. For want of a valid judgment, he was not permitted to prove the fraud of which he complained.

In the statement, or confession, the debtor, in express terms, authorized a judgment for the sum which it specifies, and he declared, in the same writing, that he was justly indebted to the plaintiff in that amount, for meat sold and delivered to him. At the trial, the plaintiff offered to prove the integrity of the transaction. The debtor raises no question in regard to it. For all the purposes of this case, the judgment must be deemed an honest one as to third parties, fairly entered as to the debtor, and standing upon his express authority and stipulation. That it was a valid recovery as to him, is a plain conclusion of law, which has not been denied in this case. That it created a lien upon the real estate which he owned at the time it was rendered, is a necessary consequence. That, in the character of judgment-creditor, he is entitled to impeach a fraudulent conveyance of real estate, seems to me to follow inevitably. Such conveyances are absolutely void as to creditors, by which the law means judgment-creditors. That relation is created by a recovery valid against the debtor, and upright in its consideration and intention as to other parties. If the debtor cannot deny the relation in such a case, his fraudulent grantee cannot. The latter stands in no better situation.

In the ruling at the trial, the policy and intent of the Code were not attended to, or were misapprehended. It was an ancient and well-settled practice of the courts to allow judgments to be recovered by confession, either without action or pending an action. Such judgments rested, as they do still, upon the simplest of all foundations—that of consent; and the consent was enough without a special and particular statement of the cause or consideration of the debt. This was so even as to other creditors and purchasers until the legislature of this State, in 1818, enacted a statute on the subject. The practice was considered liable to abuses, affecting the rights of other parties. That statute, therefore, provided that, from thenceforth, in all judgments by confession without suit, the plaintiff should file with the record a particular statement of his debt; and, if this was omitted, such judgments were to be deemed fraudulent as to other *bona fide* judgment-creditors and as to *bona fide* purchasers for valuable consideration of any lands bound or affected by such judgments. (Laws of 1818, ch. 258, § 8.) The policy of this statute was apparent on its face. Its very terms only included *bona fide* creditors and purchasers. As to the debtor himself, and creditors and purchasers not *bona fide*, a judgment by confession, without the special statement, was valid and effectual. The statute was repealed prior to the revision of 1880. The Revised Statutes required that the authority for entering the judgment should be in some proper instrument distinct from the bond or other evidence of the debt, and should be produced to the officer signing the record, and filed with it. (2 R. S., § 60.) Such were the law and the practice until the Code of Procedure, which has returned to the policy of the act of 1818, by requiring a particular statement of the demand to be verified by the debtor himself, which must contain an authority for the judgment. This statement being filed, the clerk enters upon it, and in a book, a judgment for the sum so confessed. The object of this provision is twofold: first, to change the form of proceeding, that being the general intent of the Code in all things, however simple and convenient the preexisting form

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In March previous, Keim conveyed the real estate in question to the defendant, Chamberlain, and Chamberlain at the same time conveyed it to the wife of Keim. These transfers the plaintiff alleges to be fraudulent; and he seeks in this suit to have them declared void and to set them aside. It is well settled that he must be a judgment-creditor in order to be entitled to this relief. At the trial, he offered in evidence the roll or record of his judgment. Objection being made thereto, on the ground that the debtor's written statement or confession of the demand did not comply with the provisions of the Code, the judge sustained the objection, and ruled that the judgment was void on that ground. An offer to prove the consideration and *bona fides* of the debt was also overruled; and the plaintiff was nonsuited. For want of a valid judgment, he was not permitted to prove the fraud of which he complained.

In the statement, or confession, the debtor, in express terms, authorized a judgment for the sum which it specifies, and he declared, in the same writing, that he was justly indebted to the plaintiff in that amount, for meat sold and delivered to him. At the trial, the plaintiff offered to prove the integrity of the transaction. The debtor raises no question in regard to it. For all the purposes of this case, the judgment must be deemed an honest one as to third parties, fairly entered as to the debtor, and standing upon his express authority and stipulation. That it was a valid recovery as to him, is a plain conclusion of law, which has not been denied in this case. That it created a lien upon the real estate which he owned at the time it was rendered, is a necessary consequence. That, in the character of judgment-creditor, he is entitled to impeach a fraudulent conveyance of real estate, seems to me to follow inevitably. Such conveyances are absolutely void as to creditors, by which the law means judgment-creditors. That relation is created by a recovery valid against the debtor, and upright in its consideration and intention as to other parties. If the debtor cannot deny the relation in such a case, his fraudulent grantees cannot. The latter stands in no better situation.

In the ruling at the trial, the policy and intent of the Code were not attended to, or were misapprehended. It was an ancient and well-settled practice of the courts to allow judgments to be recovered by confession, either without action or pending an action. Such judgments rested, as they do still, upon the simplest of all foundations—that of consent; and the consent was enough without a special and particular statement of the cause or consideration of the debt. This was so even as to other creditors and purchasers until the legislature of this State, in 1818, enacted a statute on the subject. The practice was considered liable to abuses, affecting the rights of other parties. That statute, therefore, provided that, from thenceforth, in all judgments by confession without suit, the plaintiff should file with the record a particular statement of his debt; and, if this was omitted, such judgments were to be deemed fraudulent as to other *bona fide* judgment-creditors and as to *bona fide* purchasers for valuable consideration of any lands bound or affected by such judgments. (Laws of 1818, ch. 258, § 8.) The policy of this statute was apparent on its face. Its very terms only included *bona fide* creditors and purchasers. As to the debtor himself, and creditors and purchasers not *bona fide*, a judgment by confession, without the special statement, was valid and effectual. The statute was repealed prior to the revision of 1830. The Revised Statutes required that the authority for entering the judgment should be in some proper instrument distinct from the bond or other evidence of the debt, and should be produced to the officer signing the record, and filed with it. (2 R. S., § 60.) Such were the law and the practice until the Code of Procedure, which has returned to the policy of the act of 1818, by requiring a particular statement of the demand to be verified by the debtor himself, which must contain an authority for the judgment. This statement being filed, the clerk enters upon it, and in a book, a judgment for the sum so confessed. The object of this provision is twofold: first, to change the form of proceeding, that being the general intent of the Code in all things, however simple and convenient the preexisting form

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would not be sufficient. We are, therefore, of opinion that the statement in this case was not defective.

The judgment should be reversed, and a new trial granted.

SMITH, J., delivered an opinion to the same effect; and all the judges concurred, both on the main question and as to the sufficiency of the statement.

Judgment reversed and new trial ordered.

CHAUNCEY v. ARNOLD and WIFE.

An instrument, in the form of a mortgage, but containing the name of no mortgagee, does not become effectual by its delivery to one who advances money upon the agreement that he shall hold the paper as security for his loan.

Whether it could be made effectual by parol authority from the mortgagor to insert the lender's name as mortgagee: *Quæra*.

APPEAL from the Superior Court of the city of New York. Action to enforce a bond executed by the defendant, Lemuel Arnold; and a mortgage upon her separate property executed by Caroline Arnold, his wife, as collateral to such bond. The complaint stated that both the bond and mortgage were executed in blank as to the name of the obligee, in the penal sum of ten thousand dollars, conditioned to pay five thousand dollars to an obligee not named, and were delivered, with the blanks not filled up, to the plaintiff, as security for moneys advanced and liabilities incurred. The material allegations of the complaint were all denied in the answer. The cause was tried before one of the justices of the court, without a jury.

On the trial the plaintiff introduced in evidence an ante-nuptial agreement between Arnold and his wife, showing the conveyance to trustees of her separate property for her use, and a power of attorney, signed by the trustees, authorizing an attorney to mortgage such estate for his benefit, and also

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introduced the bond of Arnold, the same being in blank, with the name of no obligee inserted therein; and then offered in evidence the mortgage, in like manner executed and remaining in blank. The defendants' counsel objected to the admission of said mortgage in evidence, upon various grounds then specified, among which was the objection that the same was "in all respects informal, illegal and incomplete." The objection was sustained, and the evidence excluded; to which decision the plaintiff duly excepted. The plaintiff thereupon rested his cause; and the court ordered that the complaint be dismissed.

On appeal, the court, at general term, sustained the decision that the mortgage was not a complete instrument, and that the plaintiff was not entitled to fill up the blank by inserting his own name therein, and could not maintain any action thereon, and affirmed the judgment. From this judgment, an appeal was brought to this court.

J. W. Ashmead and Grovenor P. Lowrey, for the appellant.

Wm. Curtis Noyes and Elbridge T. Gerry, for the respondents.

DENIO, J. The marriage articles prescribed the manner in which Mrs. Arnold was to exercise her power over the property settled upon her. The trustees were authorized to dispose of it to such person or persons, and in such manner and form, as she, notwithstanding her coverture, by any deed or writing, under her hand and seal, or by her last will and testament, or writing in the nature of a last will and testament, should direct, limit or appoint. Conceding that the actual participation of the trustees in the act would not be essential to effect a disposition of the property, yet the form of the disposition by Mrs. Arnold must conform to the direction of the articles. As the disposition under which the plaintiff claims was designed to operate in the lifetime of Mrs. Arnold, it must, to be valid, be by an instrument under seal. The question, therefore, is, whether the paper in ques-

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In March previous, Keim conveyed the real estate in question to the defendant, Chamberlain, and Chamberlain at the same time conveyed it to the wife of Keim. These transfers the plaintiff alleges to be fraudulent; and he seeks in this suit to have them declared void and to set them aside. It is well settled that he must be a judgment-creditor in order to be entitled to this relief. At the trial, he offered in evidence the roll or record of his judgment. Objection being made thereto, on the ground that the debtor's written statement or confession of the demand did not comply with the provisions of the Code, the judge sustained the objection, and ruled that the judgment was void on that ground. An offer to prove the consideration and *bona fides* of the debt was also overruled; and the plaintiff was nonsuited. For want of a valid judgment, he was not permitted to prove the fraud of which he complained.

In the statement, or confession, the debtor, in express terms, authorized a judgment for the sum which it specifies, and he declared, in the same writing, that he was justly indebted to the plaintiff in that amount, for meat sold and delivered to him. At the trial, the plaintiff offered to prove the integrity of the transaction. The debtor raises no question in regard to it. For all the purposes of this case, the judgment must be deemed an honest one as to third parties, fairly entered as to the debtor, and standing upon his express authority and stipulation. That it was a valid recovery as to him, is a plain conclusion of law, which has not been denied in this case. That it created a lien upon the real estate which he owned at the time it was rendered, is a necessary consequence. That, in the character of judgment-creditor, he is entitled to impeach a fraudulent conveyance of real estate, seems to me to follow inevitably. Such conveyances are absolutely void as to creditors, by which the law means judgment-creditors. That relation is created by a recovery valid against the debtor, and upright in its consideration and intention as to other parties. If the debtor cannot deny the relation in such a case, his fraudulent grantee cannot. The latter stands in no better situation.

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In the ruling at the trial, the policy and intent of the Code were not attended to, or were misapprehended. It was an ancient and well-settled practice of the courts to allow judgments to be recovered by confession, either without action or pending an action. Such judgments rested, as they do still, upon the simplest of all foundations—that of consent; and the consent was enough without a special and particular statement of the cause or consideration of the debt. This was so even as to other creditors and purchasers until the legislature of this State, in 1818, enacted a statute on the subject. The practice was considered liable to abuses, affecting the rights of other parties. That statute, therefore, provided that, from thenceforth, in all judgments by confession without suit, the plaintiff should file with the record a particular statement of his debt; and, if this was omitted, such judgments were to be deemed fraudulent as to other *bona fide* judgment-creditors and as to *bona fide* purchasers for valuable consideration of any lands bound or affected by such judgments. (Laws of 1818, ch. 258, § 8.) The policy of this statute was apparent on its face. Its very terms only included *bona fide* creditors and purchasers. As to the debtor himself, and creditors and purchasers not *bona fide*, a judgment by confession, without the special statement, was valid and effectual. The statute was repealed prior to the revision of 1830. The Revised Statutes required that the authority for entering the judgment should be in some proper instrument distinct from the bond or other evidence of the debt, and should be produced to the officer signing the record, and filed with it. (2 R. S., § 60.) Such were the law and the practice until the Code of Procedure, which has returned to the policy of the act of 1818, by requiring a particular statement of the demand to be verified by the debtor himself, which must contain an authority for the judgment. This statement being filed, the clerk enters upon it, and in a book, a judgment for the sum so confessed. The object of this provision is twofold: first, to change the form of proceeding, that being the general intent of the Code in all things, however simple and convenient the preexisting form

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dered the conveyance void ; but it was held otherwise. The court considered that the bill of sale was sufficient to have passed the title to the vessel if the blanks had remained unfilled. The point in *Penny v. Corwith* (18 John., 499), was, whether the parties to a sealed submission to arbitrators could by consent make an alteration in it after delivery ; and it was held they could, and that the instrument then took effect as a new execution of it. *Ex parte Kerwin* (8 Cow., 118) was like *Knapp v. Malby*. An alteration was made in an appeal bond by one of the obligors, by the direction of the other, after it was subscribed and before the delivery ; and the bond was held effectual. None of these cases, I think, have any material bearing upon the one under review.

A looser doctrine than the one which now prevails once received some countenance in the English courts ; but the subject has been reconsidered, and the principle for which the plaintiff contends has been overruled by a well-considered judgment of the Court of Exchequer. (*Hibblewhite v. McMorine*, 6 Mees. & Welsb., 200.) The instrument there was the transfer of shares in a corporation, which was required to be by deed ; and it was held that a transfer delivered in blank as to the purchaser's name did not pass any title. This case is supposed by the counsel for the plaintiff to be hostile to that of *Kortright v. The Commercial Bank of Buffalo* (22 Wend., 348). The difference is that, in the latter case, the transfer was not required to be by deed. The instrument which it was held might be delivered in blank was a power of attorney to make the transfer on the books. Neither the power nor the transfer was required to be under seal. The case was, therefore, one which might be, and in fact was, brought within the theory of mercantile paper ; whereas, if the transfer had required a specialty, the instrument must have been sufficient in form when it took effect by delivery, or it would not have conveyed a title.

I am for affirming the judgment of the Supreme Court.

SMITH, J. The single question presented upon this appeal is, whether the judge at the circuit erred in excluding the

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mortgage purporting to be executed by Mrs. Arnold, when the same was offered in evidence. I think there can scarcely be any doubt that the decision was entirely correct. The paper called a mortgage was not, in fact, in any sense, a deed. It was entirely incomplete. Upon its face it was an imperfect instrument. No mortgagee or obligee was named in it, and no right to maintain an action thereon, or to enforce the same, was given therein to the plaintiff or any other person. It was, *per se*, of no more legal force than a simple piece of blank paper. If the plaintiff had proved, or offered to prove, the allegations of his complaint, that this mortgage was delivered to him by the defendants under an agreement that he should make advances to Arnold, and that he should hold this mortgage as security for such advances, and that such advances were actually made on the security of such conveyance, a very different question would have been presented for our consideration.

Delivery is essential to the validity of a deed. When the deed is perfect upon its face, possession by the grantee named therein is presumptive evidence of a proper delivery. But in this case, no grantee being named in the body of the instrument—assuming that the blank might be filled after the execution of the instrument by the authority of the parties executing the same—it was indispensable to prove a delivery in fact, with the parol authority to fill the blanks with the plaintiff's name as mortgagee. The claim of the plaintiff and the argument of his counsel is, that possession of this paper, called a mortgage, implies a delivery to the plaintiff with authority to him to fill up the blank with his own name. This would be so with negotiable paper. This court recently so held in *Van Duzer v. Howe* (21 N. Y., 534), following the case of *Russel v. Langstaffe* (Doug., 516), in which Lord MANSFIELD said: "The indorsement of a blank note is a letter of credit for an indefinite sum." The same point has been so held in many other cases.

But this rule has never been applied to deeds or instruments under seal. The case of *Kortright v. The Commercial Bank of*

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Buffalo (22 Wend., 848), in which it was held that stock might be transferred by the holder writing his name in blank and putting his seal on the certificate, is scarcely an exception to this rule. That case was put upon its particular facts relating to the transfer of such securities, and evidence was given showing that such was the customary mode of transferring stock in the market of New York and elsewhere; and parol proof was given of delivery of the stock scrip in fact, as collateral to a loan of money, and of the particular facts showing that the holder received it in good faith as security for such loan. But in respect to instruments under seal, parol proof of an authority to fill the blank and deliver the deed has been generally required and given.

The earliest of leading case is that of *Texira v. Evans*, not reported but referred to in *Master v. Miller* (Anst., 228; S. C., 4 T. R., 820), by Justice WILSON. In that case, as there stated, Evans wanted to borrow £400, or so much of it as his credit should enable him to raise, and for this purpose he executed a bond with blanks for the name and sum, and sent an agent to raise money on the bond. Texira lent £200 on it, and the agent accordingly filled up the blanks with that sum and Texira's name, and delivered the bond to him. On *non est factum* pleaded, Lord MANSFIELD held it a good deed. Here it will be seen that the bond was executed by Evans and delivered to an agent with authority to fill the blanks, negotiate and deliver the bond; and it was done accordingly. All these facts were extrinsic to the bond, and were necessarily proven by parol, and this notwithstanding the blanks in the bond had been filled up; and the bond produced at the trial was upon its face a complete and perfect instrument. This case establishes the rule that an authority to an agent to fill up and complete a deed and deliver the same, may be shown by parol, and, if duly proved, is sufficient to give force and validity to the deed in the hands of a party who has received the same for value and without fraud.

This case, it is true, has been overruled in England in the case of *Hibblewhite v. McMorine* (6 Mees. & Welsb., 214), where

it was held that an authority to execute a sealed instrument could not be given by parol, but must be by deed. But this case makes a mistake, I think, in considering that there is no distinction between the original execution of a deed and the filling up of some blanks in the same, not essential to its chief object and intent, but merely to its completeness. An authority to fill up a blank in a deed cannot properly be regarded as an authority to execute a deed. The deed in *Texira v. Evans* was, in fact, executed by Evans with his own hand and seal. He made it for a bond, to any one who would take it and advance him the money he wished to loan. It was to him entirely immaterial whose name was put into the body of the bond as obligee, and the amount inserted must necessarily be the sum borrowed.

This case of *Texira v. Evans* has been followed in this State in a number of cases. Besides the case of the *Commercial Bank of Buffalo v. Kortright* (*supra*), which was decided on the authority of that case, the case of *Knapp v. Maltby* (18 Wend.) is another authority in support and approval of the rule of *Texira v. Evans*. In this case an alteration was made in a sealed instrument after its execution, under a parol authority. The court held that this did not avoid the instrument; that the case, in principle, was within that of *Texira v. Evans*; and Judge SUTHERLAND says: "The instrument was signed and sealed by the party, and not by the agent; the authority was, not to execute the instrument, but to make certain alterations or additions to it."

In *ex parte Decker* (6 Cow., 60), appeal bonds were executed in blank, with a parol authority to fill them up and deliver the bonds; the court held them valid, on the authority of *Texira v. Evans*. In 8 Cow., 118, a like bond was executed in blank, with like parol authority to fill the blank and deliver it, which was done, and held valid. And in *Woolley v. Constant* (4 John., 60), the case is likewise approved.

In other States a great variety of cases might be cited to the same effect, holding that a parol authority to fill up blanks in an executed deed, or make verbal alterations in it, might be

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proved to give validity to or sustain the instrument. But, in none of the cases that I have seen, has the deed been held valid without the parol proof of the extrinsic facts, showing the due filling up of the blanks of the deed before its delivery, and its delivery for value by the agent, upon the clear authority, direction or consent of the grantor or obligor.

While, therefore, the rule of *Texira v. Evans*, which the plaintiff's counsel invokes, should doubtless be regarded as settled law in this State, it does not help him in this case. He did not bring himself within that case. He did not give, or offer to give, proof of a parol authority to Arnold to fill the blanks in the mortgage and negotiate and deliver it; and the said blanks never were, in fact, filled by him, and the plaintiff clearly could not fill them at the trial without some proof of an authority to do so, extrinsic to the instrument itself.

The judgment should be affirmed.

SUTHERLAND, ALLEN and WRIGHT, Js., concurred.

DAVIES and GOULD, Js., thought that the paper might have been made effectual by proof of parol authority to fill the blank; and they were for reversal because the plaintiff was not allowed the opportunity to give such evidence, to which they thought the proof of the paper itself was preliminary.

Judgment affirmed.

94	338
116	378
94	338
127	139

FILKINS v. WHYLAND.

A writing in this form, "F. bought of W. one horse, \$150. Received payment. W.," given upon the purchase of and payment for the horse, is a mere receipt, and not a contract or bill of sale, so as to exclude parol evidence of a warranty of soundness of the horse by the vendor.

APPEAL from the Supreme Court. Action for breach of warranty of the soundness of a horse. Upon the trial the

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plaintiff gave evidence of the negotiation for the sale and purchase of the horse, tending to prove that the plaintiff warranted him to be sound, and that he proved unsound shortly after the delivery of him to the defendant. At the conclusion of the plaintiff's evidence, he produced, upon the call of the defendant's counsel, an instrument in writing, in these words:

"TROY, Nov. 19, '52.

"C. B. Filkins,

"Bo't of C. Whyland,

"1 Horse, \$150 00

"Received payment.

"C. WHYLAND."

The plaintiff admitted that the defendant, upon the purchase of and payment for the horse, executed and delivered this writing to the defendant. After the writing had been put in evidence, the defendant moved for a nonsuit, on the ground that, the contract of sale being in writing, parol testimony to add to or vary it by proving a warranty of soundness was inadmissible. The plaintiff was nonsuited, and took an exception. The judgment for the defendant having been reversed by the Supreme Court at general term in the third district, and a new trial granted, the defendant appealed to this court, stipulating for judgment absolute against him if the order for a new trial should be affirmed.

John K. Porter, for the appellant.

William A. Beach, for the respondent.

WRIGHT, J. When a contract is consummated by writing, the presumption of law is that the written instrument contains the whole of it; and it will not be allowed to show oral representations or stipulations, preceding or accompanying the execution of the instrument, differing from or not inserted in it. The agreement to which the contractors bound themselves is to be ascertained exclusively by the writing.

These familiar principles were applied to and controlled the

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decision of this case by the referee. Whether, in view of conceded facts, they were correctly applied, is now the single point in judgment.

The action was for a breach of warranty on the sale of a horse. The sale and delivery of the horse, the warranty and the breach thereof, were proved by parol; and, after the plaintiff rested, it was admitted that, upon purchasing and paying for the horse, the defendant executed and delivered to the plaintiff the writing set out in the case. A controlling inquiry, therefore, is as to the import and legal effect of that writing. If it is to be regarded and treated as the contract of the parties for the purchase and sale of the horse, reduced to writing, after verbal representations and stipulations, then, as it contains no warranty, it was inadmissible to add to or vary such contract by parol testimony tending to prove a warranty. On the contrary, if it be a mere receipt, acknowledging payment of the purchase-money, and not intended by the parties as an embodiment of the contract of sale, then the rule, that we can only look at the written instrument to ascertain the agreement, and that such writing cannot be varied or altered by parol proof, has no application. The defence can only prevail, if at all, on the assumption that the writing embodies the contract of bargain and sale, and that it was executed in consummation of such contract. If it be simply a receipt, and obviously not the written transfer of title to the horse, it would not be such a writing as to preclude proof by parol of the actual contract between the parties.

I think the paper is to be construed as a simple receipt, delivered and accepted as evidence of payment, and not the contract by which title to the horse was transferred. This construction will best accord with its terms, and the obvious intent of the parties in executing and accepting it. The paper cannot be read as a present agreement of sale. It contains no stipulations to sell or to buy, nor declares any present undertaking by either party. The vendor acknowledges payment, but he does not profess, by the writing, to sell. The vendee does not execute, but accepts it. It recites the fact of a past

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sale. The only words of purchase or sale it contains are, "*C. B. Filkins bought of C. Whyland,*" and they are but the admission of a fact, and not an undertaking. Looking at the instrument alone, and without the aid of extrinsic evidence, they could not be connected at all with the purchase in question. The paper does not, by its own force, at the time of its execution, vend the horse, or assume to do so. It admits that a sale has been had, but does not effect one. No presumption necessarily arises from the language used in the writing that the parties intended it for the contract of sale. A merchant's bill of items of goods sold, made up and receipted in the same form, has never been regarded as the written contract of sale, so as to preclude the purchaser from showing representations upon such sale. Nor, from the mere fact that the writing was made upon the "purchase and payment" (as admitted), is it to be presumed to be the contract of the parties, reduced to writing. It will be conceded that it answers quite as well for a receipt as for a contract, and, indeed, better, for it does not contain a single contract stipulation. It is only upon the notion that it contains all the elements for framing a contract of sale, and was admitted to have been executed upon the "purchase and payment" of the horse in question, that it is to be assumed, if at all, to be the contract, reduced to writing, entered into by the parties. But the instrument, neither in terms nor by legal intendment, expresses anything more than is contained in the most ordinary receipt for the purchase-price of property sold. No receipt could be framed, applied to a particular sale, which would not express precisely the same thing. It recites a purchase, the amount of it, and the acknowledgment of payment. This is all there is in it. Had it read, "Received of C. B. F. \$150 in payment of one horse bought by him of me," it would not have been doubted that it was a mere receipt, or acknowledgment of payment, and not the contract of purchase; yet, as it is, both in words and legal effect, it asserts the same thing. Its signification, or legal character, cannot depend upon the mere transposition of words. The defendant's counsel calls it a bill of sale, or written transfer, which it does not in terms

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purport to be, and then cites authorities holding that bills of sale, or, properly, written contracts of sale, cannot be aided by parol. The writing may be more aptly named (what is obvious, from the instrument itself, was intended by the parties,) a receipt for the purchase-money, like that appended to an ordinary merchant's bill of items. It is, in form, just that, and nothing more. I imagine it would greatly disturb business usages, and perniciously interfere with the customs of society and the transactions of everyday life, to hold that a merchant's bill of items, made up and receipted in precisely the same form, is the written contract of sale, and the purchaser is concluded from showing representations outside of it. Certainly, there is no reason, from the language employed in this writing, to presume that it was intended as the contract of sale, and not as a receipt for the purchase-money upon a contract previously concluded; and, outside of the paper, it is entirely manifest, from the evidence, it was intended as an instrument of the latter character, and not the written contract itself by which the property was transferred.

I regard the paper, therefore, as a receipt of payment for an article of property sold. It is not the written evidence of the contract of sale, and made in consummation of such contract, but was designed and executed for another and independent purpose. This construction does no violence to its language or the intention of the parties as derived from the surrounding circumstances. The theory of the defendant is, that the paper is, in form and substance, a bill of sale, or written transfer, and, having been executed and delivered "upon the purchase and payment for the horse," it is to be presumed to be the "contract of sale," and the only one entered into by the parties and reduced to writing. But this theory requires at least another assumption to sustain and uphold it, viz., that it was meant by the parties to be the written contract, and not an acknowledgment of payment. There is no such inference necessarily to be drawn from the writing itself, for if, in form and effect, it contains all the elements of a written transfer of property (which I think it does not), it is, unquestionably, in

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form and substance, a receipt for property sold. Indeed, it better answers for the latter, as it fully carries out its purpose; whereas, that can hardly be named a written contract which contains no contract stipulations, but simply recites the fact of a past sale as preliminary to and explanatory of the admission of payment. I am not inclined to dispute the proposition that, when there is a formal written contract of sale, or a bill of sale, as it is sometimes called—the instrument by its own force vending the property and effecting a transfer of the title—which is executed by one party and accepted by the other, it is to be treated as the contract for the sale of the chattels named therein. There is no other inference to be drawn, and the writing conclusively manifests the intent of the parties. There can be no other purpose assigned to it. It contains stipulations of bargain and sale, express on the part of the vendor, and implied on that of the vendee from having accepted the property and the written transfer. It is a bill of sale of this character which Chief Justice SAVAGE presents as an example in *Van Ostrand v. Reed* (1 Wend., 424), of a consummation of a contract by writing, so as to preclude parol proof from varying it. But this is not the character and conclusive nature of the writing in the present case; and, if not, then the cases, cited by the defendant's counsel, of *Mumford v. McPherson* (1 John., 414), *Van Ostrand v. Reed* (1 Wend., 424), and *Niles v. Culver* (8 Barb., 205), have no application. In *Mumford v. McPherson* the bill of sale was of the moiety of a ship. It was a formal contract, and so intended. In *Van Ostrand v. Reed*, the writing was a sealed conveyance of the right to construct and vend a particular machine within a specified territory, and authorized the grantee to prosecute for infringements. In *Niles v. Culver*, the instrument was a contract to freight, full and complete in its terms. In each of these cases the court assumed, properly, that the contract had been reduced to writing by the parties, and confined them to it. The first is the only one of a bill of sale, and that was formal in its nature, and containing all the essentials of a contract for the purchase and transfer of property.

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No one doubts that, when the contract of sale is reduced to writing, recourse can only be had to the written instrument to ascertain its extent. But the fact is always an open one, whether the parties have assumed to consummate the agreement by writing. In this case, had a formal contract of bargain and sale been shown to have been executed in writing, upon the purchase and transfer of the horse, there could have been no question that the parties intended that for the agreement of sale. But no such inference can be predicated of a paper, defective as a contract, but complete as an acknowledgment of payment. In *Allen v. Pink* (4 Mees. & Welsb., 140), a paper, which was delivered to the plaintiff when he paid the sum agreed upon for the price of a horse, viz., "Bought of G. Pink a horse, for the sum of £7 2s. 6d., G. Pink," was held not to be the contract of the parties for the sale of the horse. Lord ABINGER said: "The paper appears to have been meant as a memorandum of the transaction, or an informal receipt of the money, and not as containing the terms of the contract itself." And the plaintiff was allowed to give parol evidence of a verbal warranty. So, also, in *Huson v. Henderson* (1 Foster, 224), when the defendant had proved a bill of sale in which the horses were described, their ages stated, and the receipt of the price acknowledged, it was held that parol evidence was competent to prove a warranty of the soundness of the horses. The latter is a more marked case than the present. In the case under consideration, the written instrument was not a present, operative contract of sale, nor did it purport to be, but a formal, and not informal, receipt of the purchase-money.

The Supreme Court placed its decision of the case on the ground that the paper was, in terms and legal effect, nothing more than an acknowledgment that the plaintiff had paid the purchase-money upon the sale of a horse, and that it contained no agreement, stipulation or condition which characterizes a contract whose written terms cannot be varied by parol. Coinciding in this view, I am of the opinion that the order of the Supreme Court granting a new trial should be affirmed, and that judgment absolute should be rendered against the defendant.

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ALLEN, J., also delivered an opinion for affirmance; and all the judges concurred.

Judgment absolute for plaintiff.

THE ALBANY NORTHERN RAILROAD COMPANY v. BROWNELL *et al.*

94	345
111	45
111	59
94	345
113	312

24	345
156	577

A highway cannot be laid out over grounds acquired by a railroad corporation for the site of an engine-house, &c., necessary for its use at a station.

An injunction suit will lie to restrain highway commissioners from taking possession of such a site.

It seems that an injunction suit will not lie in a case where the commissioners would have the right to lay out a highway, but fail to acquire jurisdiction, or where their proceedings were irregular.

The statute (ch. 62 of 1853), in authorizing the construction of highways across railroad tracks without compensation, does not violate the constitutional provisions against taking private property for public use or impairing the obligation of contracts.

The title which a railroad corporation acquires to its track is qualified as being taken for public use, and is subject to the exercise by the legislature of all the powers to which the franchises of the corporation are subject.

APPEAL from the Supreme Court. Action in the nature of a bill in equity, to restrain the defendants, as commissioners of highways of the town of Hoosick, from opening an alleged highway across the plaintiffs' track, and side track and grounds, at their station at Buskirk's Bridge, in that town; and to have the proceedings for laying out the highway adjudged to be illegal and void. The case was tried before one of the justices of the Supreme Court, without a jury, in October, 1855. It appeared that the plaintiffs' corporation was established, under the general railroad act, to construct a railroad from Albany to Eagle Bridge, in Rensselaer county; that the Company, in February, 1853, acquired title to an irregular piece of land at the Buskirk Bridge station on which

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to lay their track, and also for the accommodation of a station-house, and for a side track connected with the main track by turn-outs and switches, and also for a turn-table or Y, upon which to change the direction of their engines and cars, and for other conveniences for the operation of their road.

In June, 1854, application was made to the defendants and another commissioner of highways, who afterwards resigned, to lay out a highway across the railroad track, the side track and grounds, which resulted in the laying out of the highway applied for, by an order signed by the three commissioners on the 15th July following. The plaintiffs alleged that the proceedings were irregular, because the oath to the freeholders, who were called upon to pass upon the application, was administered by Mr. Brownell, one of the commissioners, instead of a justice of the peace or other magistrate, and also because, as alleged, no notice of the meeting of the commissioners, to decide whether they would lay out the road, was given to the plaintiffs or the proprietors of the railroad. In point of fact, a written notice of the meeting, signed by the commissioners, was served upon the assistant treasurer of the Company, which came to the knowledge of the president and the treasurer and of the attorneys of the corporation, one of whom, with the assent of the other, who was the treasurer, and the knowledge of the president, attended before the commissioners on the day mentioned, and argued against the legality of the proposed highway; but his instructions were, not formally to appear on behalf of the corporation, but only to look on and see what was going forward, and he testified that he did not act on behalf of the Company.

The highway, as laid out, after passing over the two tracks, occupied a portion of the ground to which the Company had acquired title, suitable for the site of an engine-house, which structure had not then been built, but on which, after the road was laid out and this controversy had arisen, such a building was erected, occupying the entire width of the highway, and it was connected with the turn-table by another side track.

The plaintiffs neglected to open the road across the track,

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pursuant to the statute, though the commissioners gave them notice to do so, and thereupon the commissioners entered upon the premises, took down the railroad fences, and attempted to construct the highway across the tracks and grounds; but they were resisted by the plaintiffs' agents, who excluded them from the premises and put up the fences.

The Company had executed a mortgage to trustees to secure their construction bonds to a large amount, and at the time of laying out the road, and since, the trustees were in possession, as receivers, under an order of the Supreme Court, made in an action to foreclose the mortgage; and they were made parties, with the corporation, as plaintiffs in this suit.

The testimony tended strongly to show that an engine-house at this point was necessary, and that there was no convenient site for one on the land which the Company had acquired, except the place on which it was subsequently erected.

At the close of the testimony, the judge directed a judgment for the plaintiffs for the relief claimed.

The judgment entered, and affirmed on appeal at the general term in the third district, was, that the defendants be enjoined from laying out the highway across the plaintiffs' premises, and the proceedings by which it was claimed to have been laid out were declared null and void; and the defendants were adjudged to pay costs. They appealed to this court.

William A. Beach, for the appellants.

Orlando Moads, for the respondents.

DENIO, J. I am of opinion, in the first place, that the plaintiffs were not entitled to relief, on account of the alleged irregularities in laying out the road. If they were such as to deprive the commissioners of highways of jurisdiction, as is argued by the plaintiffs' counsel, still an injunction was not a proper remedy. It may be that, upon the facts proved, the order of the commissioners in laying out the road would be void, and that all persons acting under their orders in opening

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it would be trespassers. But the defect would be simply one of form, which might be remedied by a new proceeding, and would not involve any question of permanent right. The entry upon the track of the road for the purpose of opening it would be simply a trespass, commenced under color of a right acquired by the proceedings of the commissioners of highways. The ordinary remedy for the redress of such a grievance is a common action at law; and, without some extraordinary feature, a court of equity would have no jurisdiction of the case. The remedy by injunction is one of the instrumentalities by which courts of equity administered justice in cases within its jurisdiction; and now, since legal and equitable proceedings are blended, a party, to entitle himself to that remedy, must establish what under the former practice would have been an equitable cause of action. In certain cases an injunction might be obtained to prevent a trespass; but the case must be brought within some acknowledged head of equity jurisdiction. A suit in chancery would often lie to quiet the plaintiff's title to land, but this was only where the law did not afford adequate protection, as where the adverse proceeding was under a statute which made the record presumptive evidence, or the like. (*Scott v. Onderdonk*, 14 N. Y., 9.) So where a resort to equity was necessary to prevent a multiplicity of suits, or to settle a question of property claimed under a statute; but it is settled that, in such a case, the plaintiff must first have prevailed upon the trial of some of the suits. (*West v. The Mayor, &c., of New York*, 10 Paige, 539; *Eldridge v. Hill*, 2 John. Ch., 281.) If, then, the present were a case in which the commissioners of highways of Hoosick had a right to lay out and open a highway across the plaintiff's premises, provided they followed accurately the directions of the statute, a suit for an injunction and for a judgment declaring the order void would not lie upon the allegation that their proceedings were irregular, or even that, by a defect of form, they had failed to acquire jurisdiction in the particular case. There is no reason to doubt that a single recovery of damages in an action at law, or the failure to recover in a single suit brought against the

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agents of the plaintiff, would effectually settle the controversy. A bill for an injunction was never maintainable in such cases.

I am of opinion that the act of 1853 (ch. 62) applies to the case; that it authorized the town authorities to lay out the highway across both tracks of the plaintiff's railroad, and that the statute is not hostile to any provision of the Constitution. In terms, it authorizes the laying out of a highway across the track of a railroad; but, if there are two tracks parallel with and near each other, at the point where the highway is to cross, it must pass over both, or it cannot be laid at all. It is within the language of the act, for at each crossing it passes over the track of a railroad. There was, therefore, no objection, I think, to crossing the side track. But the statute declares that the highway may be laid across the track without compensation to the corporation owning the railroad. This, it is argued, is repugnant to the Constitution, as the taking of private property for the use of the public without recompensing the owner. Upon this my opinion is, that the railroad companies under the general act do not acquire the same unqualified title and right of disposition, to the real estate taken for the road and paid for according to the act, which individuals have in their lands. The statute declares the effect of the proceedings which it authorizes to be, that the company "shall be entitled to enter upon, take possession of, and use the said land *for the purposes of its incorporation* during the continuance of its corporate existence;" and it further declares that the land which it thus appropriates shall be deemed to be acquired for public use. The title to the land being thus limited to its use for the purposes of the railroad enterprise, it is necessarily subject to the exercise of all those powers reserved to the legislature to which the franchises of the corporation are subject. If the latter can be restricted or modified by subsequent legislation, the uses to which the land which the corporation has acquired may be changed by the same authority. It has long been the policy of the legislature to qualify corporate franchises in such a manner as to render them subject to the control of the law-making power. For

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this purpose the Revised Statutes provided that the charter of every corporation which should thereafter be granted by the legislature should be subject to alteration, suspension or repeal at its discretion. (1 R. S., p. 600, § 8.) Perhaps this provision would apply to corporations created under general laws, which, though not granted specifically and directly by the legislature, are, nevertheless, emanations from the legislative power. But the general railroad act itself provides that the corporations formed under it may be annulled or dissolved at any time by the legislature. (Laws, 1850, p. 234, § 48.) The effect of this and similar provisions has frequently been before us; and we have held that, under the reserved power, the legislature might interfere in many important respects with the powers of corporations, by subjecting them to new restrictions or increased burdens. We have held, for instance, that the line of a plank-road might be extended and its capital increased, and that the same thing might be done in respect to a railroad corporation created under a special enabling act; and that a banking corporation, chartered under the general act of 1838, without personal liability of the shareholders, might be so changed as that they should be liable for all the debts of the company to an amount equal to the stock held by them respectively. (*Schen. & Sar. Plankroad Co. v. Thatcher*, 1 Kern., 102; *The Buffalo, &c., R. R. Co. v. Dudley*, 4 id., 336; *In the matter of Oliver Lee & Co.'s Bank*, 21 N. Y., 9.) The change effected in the present case is of slight importance, compared with those which were upheld in the instances referred to. A railroad laid out upon or near the natural surface of the earth may be crossed, without material inconvenience, by a common highway, on the same grade with the railroad track. The property of the railroad is not taken away from the proprietors, who are still allowed to use it for all the purposes for which it was acquired from the original owner. Nor is there anything unlawful in obliging the railroad company to make the necessary excavations or embankments for taking the highway across the railroad. The disturbance of the surface of the

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ground, which has rendered such work necessary, was effected by the railroad itself; and the reservation of legislative authority we may suppose to have been inserted for the purpose of obliging the companies to conform to such directions as subsequent legislatures should discover to be necessary for the public good, or which should be required by public policy. The difficulties which arose out of the rule that the grant of corporate power for individual emolument created a contract between the corporators and the State, led to the reservation referred to; and this case presents a strong illustration of the wisdom of the legislative policy. The case of *Miller v. The New York and Erie Railroad Company* (21 Barb., 513) was adjudged in hostility to these principles, and I think it cannot be sustained.

But the highway was laid out, not only across the track of the railroad and the land acquired by the corporation for the purpose of locating the track, but across the grounds which they had acquired as sites of their station-house, engine-house, turn-table, &c.; and no provision was made for compensation. The act of 1853 does not, in language or by any necessary implication, extend to an appropriation of such land to the purposes of a highway, and it does not fall within the policy which contemplated that the track of the railroad might be so used. The use of the land acquired by the railroad company for its track was such as admitted of a concurrent use for the purposes of a highway; but it was quite otherwise with that which was obtained for the engine-house and other structures. As to this, the uses to which it was to be subjected were the same as those which any proprietor of land may be supposed to have for premises purchased by him for building purposes. To run a highway through such grounds is to appropriate the portion covered by it exclusively for a public use. Moreover, such land falls within the denomination of improved land, through which a highway cannot be laid out without an obligation to make compensation. (1 R. S., p. 514, §§ 53-64.) But, admitting that the failure to make compensation, though it would render the appropriation illegal, would not raise such a question as to

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bring the case within the scope of equitable jurisdiction (as to which I express no opinion), there is still another question, whether the commissioners had any power whatever to lay out the highway over such portions of the land of this company as might be needed for the site of their engine-house. I shall assume that the place where that structure was eventually erected was the only position on the land of the company where it could have been placed, and that such a building was a necessary accommodation for the company at that station, and one of the objects for which the land was required. These are questions of fact, which ought to have been found one way or the other by the judge. There being evidence respecting them, we must assume that they were in fact determined by the judge in a manner favorable to the decision which he made. The question is, then, presented, whether, when a railroad company has acquired the title of a piece of land for the site of a building necessary for its business, the local authorities can occupy the ground for a highway, and thus prevent the company from erecting the proposed building. I am of opinion that it cannot be lawfully done. The 57th section of the title of the Revised Statutes on this subject forbids the laying out of a highway through any buildings, or any yards or inclosures necessary to the use and enjoyment thereof. (1 R. S., 514; and see *Ex parte Clapper*, 3 Hill, 458.) Before this highway was laid out, the railroad company had established their station at this place, and had erected the station-house. To the completion of their arrangements for a railroad station, it was essential that they should also have an engine-house and a turn-table. The remainder of the land—no more having been acquired than was needful—may well be considered as an inclosure necessary for the enjoyment of the building already erected, namely, the station-house. The necessity of having the engine-house on that spot, and the consideration that it could not be erected elsewhere, shows that the land on which it stood was necessary for the enjoyment of such of the other station buildings as had already been completed.

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For the disturbance of such an interest as this, under a claim of a right of permanent occupancy, I am of opinion that a suit for an injunction would lie to establish and quiet the plaintiffs' title to the enjoyment of their premises for the purposes for which they were acquired and appropriated. The case seems to be within the principle of *The Mohawk and Hudson River Railroad Company v. Archer* (6 Paige, 87), and the two cases therein cited.

It follows from these suggestions that the judgment ought to be affirmed.

SELDEN, Ch. J., and WRIGHT, J., expressed no opinion; all the other judges concurring,

Judgment affirmed.

SMITH *et al.* v. WILCOX *et al.*

A contract for the publication of an advertisement in a newspaper to be issued and sold on Sunday, is void.

APPEAL from the Supreme Court. The plaintiffs, the proprietors of the "Sunday Courier," a newspaper printed and published in the city of New York, brought their action against the defendants to recover the agreed price of publishing an advertisement of and for the defendants in such newspaper for six months, in pursuance of a contract made with the agent of the defendants. The making of the contract and the performance of the duty by the plaintiffs was proved. It was also proved, that the Sunday Courier was a weekly paper purporting to be published on Sunday morning, that it was dated on Sunday and issued, that it went to press on Saturday night at times varying from 10 or 11 o'clock Saturday night to 2 or 3 o'clock Sunday morning. That it was one "of the Sunday papers;" that the proprietors commenced issuing and selling the papers early Sunday morning; that they had a public place

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for selling the papers, opened for everybody to buy. The cause was tried before ROSEVELT, J., who nonsuited the plaintiffs upon the ground that the contract for the publication of the advertisement, and its publication, were in contravention of the law for the observance of Sunday, and the judgment was affirmed by the Supreme Court sitting in the first district. The plaintiffs appealed to this court.

John H. Reynolds, for the appellants.

John K. Porter, for the respondents.

ALLEN, J. Our statute regulating the "Observance of Sunday," prohibits all servile labor or work on that day excepting "works of necessity and charity," unless done by those who keep Saturday as a holy day and whose labor does not disturb other persons in the observance of the first day of the week as holy time. It also prohibits the exposure to sale on that day of "any wares, merchandise, fruit, herbs, goods or chattels," except meats, milk and fish, which may be sold at any time before nine o'clock in the morning. (1 R. S., p. 676, §§ 70, 71.) The statute is in harmony with the religion of the country and the religious sentiment of the public, and for the support and maintenance of public morals and good order. Its design is not to enforce the conscience or compel the religious observance of the day or compel conformity to any religious rites or ceremonies, but simply to secure to the day that outward respect and observance which is due to it as the acknowledged Sabbath of the great mass of the people, to protect the religion of the community from contempt and unseemly hindrances, and to its professors the liberty of quiet and undisturbed worship on the day set apart for that purpose. Acts not interfering with the benevolent design of the Sabbath by disturbing and hindering those who for themselves and families desire to enjoy and improve it are not prohibited by this statute; and acts not prohibited do not take their character from the day on which they are done, but are lawful or unlawful in reference to the general laws of the land. The acts

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regulating the observance of the Sabbath are remedial statutes and to be construed liberally in respect to the mischiefs to be remedied. Chief Justice BEST, in speaking in terms of warm commendation of the judgment of BAYLEY, J., in *Fennell v. Bidler* (5 B. & C., 406), says: "In one of the most able judgments ever delivered, he [BAYLEY] says, that the most liberal construction must be put on that statute [29 Car. II, c. 7, for the protection of the Sabbath], because it is in affirmance of the religion which is the basis of the law of this country." *Smith v. Sparrow* (4 Bing., 84). BAYLEY, J., in the case cited (*Fennell v. Bidler*), says further. "The spirit of the act is to advance the interests of religion, to turn a man's thoughts from his worldly concerns, and to direct them to the duties of piety and religion; and the act cannot be construed according to its spirit unless it is so construed as to check the course of worldly traffic." Upon the principle that the statute was entitled to such a construction as would promote the ends for which it was passed, and that the act in question in that case was within the mischief intended to be suppressed and within the word made use of to suppress it, judgment was given against the plaintiff: the court holding that a horse dealer could not maintain an action upon a contract for the sale and warranty of a horse made by him upon a Sunday. In the same case the narrow construction put upon the act by the same judge in *Blossome v. Williams* (8 B. & C., 282), is disapproved. PARK, J., in *Williams v. Paul* (6 Bing., 658), says, "I should be sorry to be supposed to recede from the cases decided on this point and the principle established to enforce the observance of the Lord's day, which tends so eminently to the advantage of society, since no laws can be of avail except in so far as they are founded on religion." The English statute differs in terms from our own, but they were enacted in the same spirit and with the same general purpose, and are entitled to the same liberal construction in furtherance of the remedy and the suppression of the mischief contemplated. The same view has been taken of the policy and character of the statute in our own courts. NELSON, J., in *Northrup v.*

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Foot (14 Wend., 248), says, "It is a remedial statute and should be liberally construed." Full effect has been given to the statute whenever it has come before our courts. While acts not within the inhibition have been treated as valid, although done on Sunday, and contracts not within the spirit of the act have been enforced although made on that day, all acts within the statute have been regarded as illegal and contracts prohibited to be made on that day if then made, and all contracts for a violation of that law and the performance of acts on Sunday not lawful to be done on that day, have been regarded as void and have not been enforced. No judicial act can be performed on Sunday; and, hence, an award published on that day is void at common law. (*Story v. Elliott*, 8 Cow., 27.) An action for deceit in the sale of a horse on Sunday, when all secular business is prohibited on that day, will not lie. (*Northrop v. Foot*, 14 Wend., 248.) The contract being void, no action can arise out of it or be maintained depending upon it. The charge of circulating a memorial to the legislature on Sunday was held to present a question of law for the decision of the magistrate to whom application was made for a warrant, and thus furnish a protection to the magistrate when sued for false imprisonment. (*Stewart v. Hawley*, 21 Wend., 552.) A clerk in an attorney's office was not allowed to recover of his principal for extra services performed on Sunday. (*Watts v. Van Ness*, 1 Hill, 76; *Palmer v. The Mayor, &c., of New York*, 2 Sandf., 818; *Dodge v. Lambert*, 2 Bos., 570.)

There is no dispute as to facts. The only evidence bearing upon the question was that elicited upon the cross-examination of a single witness of the plaintiffs and the nonsuit was granted upon the ground that the contract upon which the action was brought, was in contravention of the statute regulating the observance of Sunday. No request was made to submit any question of fact to the jury; no complaint is even made that the court declared the legal effect of the evidence without a settlement of the facts by the jury; and both parties desire a decision of the case upon the merits without regard to the form in which the questions are presented.

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There is no evidence that the contract was made on Sunday; and if it was it would not for that reason be void if it did not contemplate and provide for some prohibited service or act to be done on Sunday. In other words, a contract made on Sunday for the publication of an advertisement in a newspaper published on the ordinary business days of the week is not prohibited and would be valid. (*Story v. Elliott, supra*; *Sayles v. Smith*, 12 Wend., 57; *Boynston v. Page*, 18 id., 425.) Neither is there evidence to vitiate the contract upon the ground that the work of setting up and printing either the advertisement or the paper, which is servile work and labor, was to be done or was contemplated to be done on Sunday. That work might well have been done on any other day of the week, and was done in whole or in part on Saturday. It was not necessarily done, nor was it agreed to be done, on Sunday. What the effect would have been had it appeared that all the work had in fact been done on the Sabbath, if it had been so done for the convenience or pleasure of the plaintiffs, neither the contract nor the nature of the service contemplating any such thing, need not be considered.

The service to be rendered by the plaintiffs was the publication of an advertisement in a Sunday newspaper. There is no pretense that it was a work of necessity and charity, either to publish the paper or the advertisement, even if it could be brought within the section of which the exception in favor of works of "necessity and charity" forms a part. The advertisement was published with, and as incidental to, the publication of the paper, and the contract must be assumed to have contemplated the service to be performed in the usual way, and as it was, in truth, done. The papers were sold on Sunday at a public place provided by the plaintiffs, the proprietors, for that purpose: that was the publication, and that the service agreed to be performed, and for which they now ask compensation. The publication of the advertisement was to be and was by a public sale of the newspaper in which it was printed, on Sunday. The opening of a place for the sale and the actual selling of newspapers is within the mis-

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chiefs which the act for the observance of Sunday was designed to remedy. It disturbs the public peace and quiet; interferes with the proper religious observance of the day: is opposed to good morals: and tends to draw men away from the duties of piety and religion, and cannot be distinguished from traffic in any other article which is the subject of sale in market. It matters not what the character of the paper or the character of the advertisement published for the defendants may have been. Neither were "meats, milk or fish," and therefore were not within the articles excepted from the prohibition, and even if it were within the other section of the statute, it would be difficult to prove that the sale of the most unexceptionable religious newspaper was an act of "necessity and charity."

The statute is very comprehensive and has sought to use terms which would embrace every article which could be sold in market. It prohibits the exposure and sale of all "wares, merchandise, fruit, herbs, goods or chattels." Everything which is the subject of property and which may be exposed to sale must be included under some or one of these terms. A newspaper is the subject of property, and when it is made the subject of sale in places opened for that purpose it is certainly merchandise. Newspapers are made merchandise when they are sold, either at wholesale or retail, as other articles are sold which have ever been usually regarded as merchandise. This mode of publication by selling newspapers in large packages to be resold by the purchaser, or at retail, and by the single paper is of comparatively modern introduction; but as in this way the character of merchandise is given to the paper, the business of selling and exposing to sale the newspapers must be governed by the general laws affecting similar dealing in other articles of merchandise. It is exposing an article to sale that constitutes the offense, and not the character of the article, unless it is among the exceptions in the act. "Goods, wares and merchandise" include all movable property that is ordinarily bought and sold. "Chattels" is more comprehensive than "goods," and includes animate property.

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(2 Ch. Pl., 55, n. [r].) The plaintiffs necessarily, in the performance of their agreement by the publication of the advertisement, violated the letter as well as the spirit of the act prohibiting the exposure of merchandise for sale on Sunday, and no action will lie upon such contract. In a sense it was a contract by the plaintiffs for the performance of servile work on the Sabbath. They agreed to publish and circulate the advertisement of the defendants on Sunday by delivering a copy to each of their customers who should buy of them a copy of their paper; and incidentally they agreed to expose for sale and sell on that day their paper containing the advertisement. This was servile work in the same sense that the service of the attorney's clerk was, or that of a salesman in a dry goods store would be. The contract was void, and the judgment must be affirmed.

All the judges concurring,

Judgment affirmed.

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24	350
119	464
24	350
130	600
132	560

An agreement, upon the mortgage of chattels, that the mortgagor shall keep possession and retail the goods for cash only, paying over the money to the mortgagee, is not fraudulent in law, but presents a question of good faith for the jury.

The attorney in an execution, who refused to state whether he directed the sale of particular chattels by instruction of his client, and challenged a suit against himself, is estopped from denying that he acted on his individual responsibility.

The owner of such chattels, who states his claim and forbids the sale, may purchase the property without impairing his right of action for the trespass.

A paper issued by a court of record in the form of a commission to take testimony, but without a seal, is a nullity, and depositions taken under it are not admissible as evidence.

APPEAL from a judgment of the Supreme Court. The action was for taking and carrying away personal property.

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The judgment upon a verdict for the plaintiff taken on a former trial had been reversed by this court and a new trial ordered (13 N. Y., 577). On the second trial it appeared that S. Sutherland kept a retail hardware store at Newark, Wayne county; and on the 11th October, 1848, mortgaged his stock of stoves, hollow-ware, &c., and also his household furniture to the plaintiffs to secure them as the indorsers, for his accommodation, of a promissory note, made and indorsed at the time of giving the mortgage and discounted for the benefit of Sutherland at a bank at Geneva. The goods were seized on an execution in favor of J. & A. Morrison for \$611.86, on the 18th January, 1849, and were subsequently sold by the under-sheriff of the county. These creditors resided at Troy and the defendant was their attorney in Wayne county, and in that character recovered the judgment and issued the execution. Two principal questions were litigated on the trial: whether the plaintiff's mortgage was *bona fide* or fraudulent; and whether, if it was valid, the defendant had made himself personally liable for the trespass by the part he had taken in procuring the seizure and sale of the property—he contending that he had done nothing beyond placing the process in the hands of the sheriff and communicating to him the plaintiffs' directions to have the property in question seized and sold, and executing an instrument of indemnity on behalf of his clients. It appeared that being aware of the mortgage to the present plaintiffs, the judgment creditors had elected to contest it by a seizure of the property, and for that purpose had, by letter, authorized their attorney, the present defendant, to sign in their behalf and in their names a bond of indemnity. This he did by executing an instrument to that effect under seal, which act was held, on the former occasion, not to charge him as a trespasser. But it was, in addition, sworn to by the plaintiffs' witnesses on the present trial that the defendant personally directed the under-sheriff to take the property in question and to sell it under the execution; and that during the sale when Ford, one of the plaintiffs, forbid it, the defendant directed the sheriff to go on, saying that he would protect

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him, and that he was present and gave general directions at the sale. There was some contradictory evidence as to this. It was also shown that at an interview between Ford and the defendant after the sale, the latter was requested to state at whose request he acted in directing the sale of the goods, but refused to disclose, and, upon being told that he would be sued unless he would do so, he replied that the plaintiffs might sue him as soon as they pleased.

On the question of the *bona fides* of the mortgage it appeared that Sutherland continued in possession of the store from the time of executing it until the levy on the execution; and made sales of portions of the property, apparently in the same manner that he had done before the mortgage; but it was shown by the testimony of Sutherland, and of the plaintiff, Ford, that it was agreed when the mortgage was executed that Sutherland should sell the property as he could find purchasers for cash, but not on credit; and that the whole proceeds of the sales should be applied upon the note which the plaintiffs had indorsed. Sutherland swore that he had sold only to the amount of ninety dollars, eighty dollars of which had been applied in part payment of the note, and the remainder had been spent by him without the knowledge or consent of the plaintiffs, and that he had not made any sales on credit. There was evidence tending to show that one article had been sold on credit, but Sutherland swore that it was by a clerk, without his knowledge or consent. It appeared that the plaintiffs had purchased some of the articles at the sheriff's sale.

The defendant's counsel moved for a nonsuit, claiming that the testimony was not sufficient to charge him with such a participation in taking the goods as would make him a trespasser, and that the mortgage was void on account of the possession remaining in the mortgagor, and on account of the permission given him to make sale of the property; and also that the purchase of part of the property by the plaintiffs was a waiver of their title and a license to the sheriff to make the sale.

The defendant offered in evidence the deposition of a witness examined in Michigan, by virtue, as it was claimed, of a com-

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mission; but it appeared that there was no seal to the paper called a commission. The judge, upon the plaintiffs' objection, ruled that it was inadmissible, and the defendant excepted.

The defendant presented a number of written propositions, the affirmative of which he requested the judge to charge; but the charge actually given, and the exceptions to portions of it, raise all the questions of law which were presented.

The judge charged, in effect, that the retaining of possession of the goods by the mortgagor rendered the transaction presumptively fraudulent, and that the burden of proof to rebut this presumption, and to show the mortgage to be fair and honest, was upon the plaintiff; that, where property mortgaged is of the character of that in question in this case, an agreement that the mortgagor might retain the possession and continue to sell it as he had done before, would make it fraudulent and void; but, in this case, if, by an arrangement between the parties honestly made, the plaintiffs allowed the mortgagor to sell a part and apply the proceeds towards the payment of the debt which the mortgage was given to secure, and there was no intention that the mortgage should be used as a cover to protect it from Sutherland's creditors, so that he might control and sell it for his own benefit, the transaction might be sustained. Upon the question of the defendant's liability, if the mortgage should be found to be valid, he charged that all who aided and abetted a trespasser were themselves liable for the tortious act; but that an attorney was permitted to do what appertained to his duty as an officer of the court without being chargeable as a trespasser if a seizure on the execution should prove to be unwarranted; "but if, beyond that, the defendant in this case personally interfered with the removal and sale of the property; if he aided and assisted, or directed the sheriff in the sale; if he directed the sheriff to go on, and pointed out the property to him; if he declared he would indemnify and protect those who bid on the sale, this would not be within the line of his duty, and would be an excess of his authority as an attorney, and would make him personally liable as a partaker and assistant, or aider, in the trespass." He added

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that, if the defendant did this, on the sale, and refused to give up the names of his principals to the plaintiff when asked to do so by him, and if he told the plaintiff, on making such request, to sue him, he would be estopped, as the judge thought, from denying, in this action, that he personally directed the sale, or assumed the personal direction thereof. The defendant excepted to the foregoing two propositions; and he excepted to the judge's refusal to charge peremptorily that the mortgage, under the circumstances proved, was fraudulent and void.

The jury found a verdict for the plaintiff, and the judgment rendered upon it was affirmed at a general term; upon which, the defendant appealed here.

Stephen K. Williams, appellant, in person.

George F. Comstock, for the respondents.

DENIO, J. The chattel mortgage under which the plaintiffs claimed title was not illegal on account of anything contained in it; and, having been filed according to the statute, it was capable of being sustained against the creditors of the mortgagor by proof sufficient to rebut the inference of fraud arising out of the retention of possession by him. So far as concerned the debt which it professed to secure, the proof of *bona fides* was satisfactory. The plaintiffs indorsed a note to enable Sutherland to raise money at a bank, to pay off a judgment against him upon which an execution had been issued; and the mortgage now in question was given to indemnify them for their indorsement. So far, the transaction was quite fair and honest. But if the debtor was permitted, not only to retain the possession of the property mortgaged, but to sell it out by retail, on his own account, as he had been doing before the mortgage, we think, with the judge who tried the case, that the arrangement would be fraudulent and the security void. But it would not have been inconsistent with the nature of the transaction, or with good faith, that the mortgagees, by themselves or their agent, should have been permitted to sell the goods by retail, for cash, and apply the money which they

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might bring towards the discharge of the debt which the mortgage was given to secure. This was what the plaintiffs professed to prove, only they made the mortgagor, instead of a third person, their agent. He, according to his own testimony and that of one of the plaintiffs, was to sell, in effect, as the agent of the mortgagees; for he was to sell only for cash, and was to apply the money towards paying the note. An arrangement in these terms might have been merely colorable, and a device to protect the property against the pursuit of other creditors. I would not advise a creditor to take a mortgage of such property, accompanied by such an agreement, for, in most cases, a jury would regard it with great suspicion, and would be apt to consider it a fraudulent contrivance; but such an arrangement may possibly be made without any improper views. Whether, in a given case, it was fair or fraudulent, would be a question of fact for the jury to determine. (2 R. S., p. 187, § 4.) It would be otherwise, if the question depended upon the effect of a written instrument, as we held in *Edgell v. Hart* (5 Seld., 213), or if it should arise upon an admitted or undisputed state of facts which showed an arrangement quite inconsistent with fairness and honesty, as where such an arrangement as that existing in *Edgell v. Hart* was made by parol outside of the mortgage; but where the transaction, though suspicious, is capable of a construction consistent with fairness and the absence of fraud; it must be passed upon by the jury. The charge in this case was in accordance with these views; and, if the defendant has failed to receive justice, it was not for the want of having the law correctly laid down by the judge.

I notice that the defendant insists that, where the mortgagor is suffered to retain the possession, the only points to be left to the jury are those relating to the consideration, and those adduced to explain the want of possession following the transfer. But, in my opinion, if there are any other circumstances of a suspicious nature attending the transfer, the explanation respecting such circumstances is to be addressed to the jury, unless they are of a character entirely inconsistent with

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the integrity of the transaction, and which no explanation either to the court or jury could make lawful. In that case, indeed, the court is to pronounce the law. But an agreement that the mortgagor may dispose of the goods for cash and bring the money to the mortgagee, the latter holding the title until such disposition shall be made, may, as has been said, possibly be sincere and without fraud. The law does not, therefore, condemn it absolutely, but submits the question of good faith to the jury.

The evidence on the present trial was very full to show the defendant to have directed the seizure and sale of the property; and the rules of law as to what kind of participation in a trespass will implicate a person in the wrong, were correctly laid down by the judge. But the defendant objects to the ruling in which it was stated, that the fact that the defendant refused to disclose on whose behalf he was acting, and told the plaintiffs to sue him, estopped the defendant from denying that he directed the sale of the property. I think the case does not raise such a question. As I understand it, the charge was that if the defendant, besides directing the sale and promising to indemnify the bidder, refused to name his principals and invited the plaintiff to sue him that he would be estopped from denying his complicity. The substantial correctness of such an instruction cannot be doubted. But if the charge were such as the objection assumes, I think it would be right. The defendant certainly issued the execution and attended and countenanced the sale. It might be that, conceding these facts, he was not a trespasser, and that the officer and the plaintiffs in the execution were the only parties implicated, as we held when the case was here before; yet if he acted officiously, and beyond the scope of his duty as an attorney, or if he directed the execution to be levied on this particular property without instructions for that purpose by his clients, he would be liable. The present plaintiffs, after the sale, required an explanation on that point, which, according to the testimony, he refused to give, taking the responsibility upon himself by inviting the plaintiffs to sue him. This, if the testimony were

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believed, would be a ratification on his part of the act of selling the property, which would render him subject to its consequences; and, in consequence of that declaration, if the plaintiff sued him instead of the other parties liable, he would be estopped from insisting upon a defence which, if allowed, would subject the plaintiffs to costs for acting on his invitation.

The remaining question is whether the deposition alleged to have been taken by virtue of a commission to Michigan was properly excluded. By the common law, the manner in which a court of record authenticated its process was by affixing its seal. It followed from that theory that a paper otherwise purporting to be a writ which lacked that evidence of its genuineness was a nullity. (*The People v. McKay*, 18 John., 212; *Tracy v. Suydam*, 30 Barb., 110.) Innovations have of late years been made upon this theory. The most important modification was that inserted in the judiciary act of 1847, where it is declared that no process, except such as should be issued by the special order of the court, should be deemed either void or voidable for the want of a seal when it should be signed by the attorney or party issuing it (p. 386, § 57). This case is within the exception, because commissions to take testimony in another State are issued only on motion, or where by stipulation a motion is waived. We have been referred to cases showing that process issued without a seal has been amended on motion. This is no doubt so, and it might be shown that the total failure of a necessary record or writ has been remedied by filing such a paper *nunc pro tunc*. But this practice does not touch the present case, where there had been no application to the court and no order in the matter.

It was no answer to the action that the plaintiffs became bidders upon portions of the property, after they had stated their rights and had forbidden the sale. It is no defence to an action of trover or trespass that the plaintiff has got back his property which the defendant wrongfully took or converted. In such cases the measure of damages is the sum paid to obtain the property. (*Murray v. Burling*, 10 John., 175; *Baker v. Freeman*, 9 Wend., 86.)

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It follows from what has been said that no error was committed by the court below, and that the judgment ought to be affirmed.

All the judges concurring,

Judgment affirmed.

FRIESS v. RIDER.

The vendor in a contract for the sale of land being in default, and the time extended for his convenience, the vendee may insist upon strict performance at the very hour appointed.

The vendor again making default, but tendering performance after the lapse of three hours, the vendee is not required to assign any reason for his refusal to accept it, and it is, therefore, immaterial that he assigns a reason which is not well founded in fact.

So held in an action by the vendor for stipulated damages, where the vendor, on the day for giving his deed, the vendee being then ready with his money, requested a postponement to a fixed hour the next day. At the time appointed the vendee attended, and, after waiting three hours, departed. At a subsequent hour of the same day, the vendor tendered a deed, and the vendee stated, as reason for declining, not the lapse of time, but waste of the premises, which was not supported by the facts. The case of *Gould v. Banks* (8 Wend., 562), considered and limited, *per* ALLEN, J.

APPEAL from the Supreme Court. The facts on which its decision was based were these: On the 2d day of July, 1854, the plaintiff agreed in writing to sell and convey to the defendant a house and lot, and to deliver the possession of the same to the defendant on the 2d day of April, 1855. In the same contract the defendant agreed to pay the plaintiff, in consideration therefor, the sum of one thousand dollars on the said 2d day of April, 1855. On that day the defendant went to the house of the plaintiff with one thousand dollars for the purpose of making payment, and the plaintiff was not then ready to receive the money or execute the deed. It was then and there agreed, by parol, between the parties, that they

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should postpone the time of payment, and execution and delivery of the deed until the next day; and that they should meet the next day at one o'clock, at the office of one Henry Smith, and perform the conditions of said contract. On the 8d day of April, 1855, at twelve o'clock, the defendant and William B. Borst came to the office of Henry Smith with one thousand dollars, and remained there until three o'clock, and then left. The plaintiff did not come there while the defendant was there. Soon after the defendant left said office, the plaintiff came there. About four o'clock in the afternoon of the said 8d of April, 1855, the plaintiff tendered to the defendant a deed of the premises in question, duly executed by the plaintiff and his wife to the defendant, dated April 2d, 1855, and duly acknowledged, April 8d, 1855, together with the key of said house, which the defendant at that time declined to receive, on the ground that the house was out of repair, or that waste had been committed upon the premises, and Borst, who was to furnish the defendant with the \$1,000, said he had parted with five hundred dollars of the money that afternoon.

The evidence failed to establish the commission of any waste.

The referee, before whom the trial was had, ordered judgment for the plaintiff for \$200, the sum fixed by the contract as stipulated damages. This judgment having been affirmed at general term in the third district, the defendant appealed to this court.

Henry Smith, for the appellant.

James H. Ramsey, for the respondent.

ALLEN, J. The plaintiff not being in a condition to perform the contract on his part on the day fixed for that purpose, the defendant being ready and offering to perform, for the convenience and at the request of the plaintiff, performance on that day was waived by the parties and the time extended

until the next day at one o'clock; and a place for the performance was agreed upon by parol.

This parol extension was valid and operated to continue to the parties all their rights under the contract over to the time fixed for its final performance. Every other stipulation in the contract remained in full force; and the only effect of the arrangement was to substitute another day and agree upon a place for the delivery of the deed and the payment of the purchase-money. (*Dearborn v. Cross*, 7 Cow., 48.) The contract was continued alive, and neither party lost the right to insist on a strict performance at the time agreed upon by parol, or in default thereof the payment of the liquidated damages. (*Esmond v. Benachoten*, 12 Barb., 366; *Hasbrouck v. Tappen*, 15 John., 200.) The mere extension of time is not a waiver of anything. An enlargement of the time for making an award does not dispense with the stipulation to make the submission a rule of court. (*Evans v. Thomson*, 5 East., 198.) The contract here was not sealed, so that the question as to the effect of a parol agreement upon a sealed executory contract, made before breach, does not arise, which was the question in *Delacroix v. Bulky* (13 Wend., 71). But as performance of a covenant may be waived by parol, there seems to be no objection to an extension of time, which is but a temporary waiver of performance by parol. In *Fleming v. Gilbert* (8 John., 528), it was held that the time of the performance of the condition of a bond may be enlarged by parol agreement of the parties. (*Stone v. Sprague*, 20 Barb., 509.) Assuming, therefore, the enlargement of the time of performance to be valid, and that all the other stipulations remained in full force, the parties were only bound to each other according to the contract thus modified as to the time and place of performance. Each could require performance of the other the next day at one o'clock at the office of Mr. Smith, and at no other time or place. Certainly the party making default at that time could not put the other party in default by a subsequent offer of performance. The agreement was not for an enlargement of the time until one o'clock the next day or such other time as

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should suit the convenience of either party. The plaintiff was in default on the day named in the contract; and the defendant being then ready and offering to perform on his part, might have had his action against the plaintiff without a formal tender of the money. The plaintiff was not then in a condition to perform and so declared, and a formal tender would have been nugatory. (*Bellinger v. Kilts*, 6 Barb., 278; *Buck v. Burk*, 18 N. Y., 887.) This cause of action was waived by the defendant. On the next day at the hour named the defendant was at the place agreed upon, and remained two hours ready and expecting to perform the contract, and the plaintiff did not appear. There was no formal offer or display of the money at the office; and whether, without some formal act of the kind and public demand of performance, the plaintiff could have been subjected to an action, is not material to inquire. He was certainly in default, and in no situation to subject the defendant to a penalty for non-performance. If the plaintiff had not, by his neglect and default subjected himself to an action, then the only effect of his non-attendance and the omission of the defendant to assert his rights under the contract was an abandonment of the contract by mutual consent. The plaintiff had occasioned the necessity for the delay, and the enlargement was but the giving of time to him to perform on his part, and to relieve him from the consequences of a default already incurred. When the demand was made, the time having elapsed, the defendant was not bound to accept performance or give any excuse for non-acceptance; and whether he gave a true or false reason is not material. Within the case of *Gould v. Banks* (8 Wend., 562), the offer, although too late to secure to himself any rights under the contract, or subject the defendant to the penalty for non-performance, might have been in season to deprive the defendant of the cause of action already accrued if he had assigned a reason false in fact, and, by silence on the subject, waived the true reason which he might have assigned and insisted upon, to wit, the lapse of time. That is the extent to which *Gould v. Banks* goes, and the principle ought

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not to be extended, certainly not to give a party grossly in default an action for a penalty. If the contract was rescinded and abandoned as suggested, it could not be renewed without the consent of both parties; and it is not material that the reasons assigned by either for declining to treat it as still in force are either frivolous or false. He may refuse to renew the contract without being responsible for his reasons. If the contract had been broken by the plaintiff, then the most he could do was to satisfy and discharge the cause of action against himself; and a discharge of that did not restore the contract and give him an action against the party who had kept his promise. But the judgment of the court below has not the support that the defendant, by not urging the lapse of time as a reason for not accepting the deed, when offered, waived it, and thereby consented to treat the contract as still in force. He did say, as one reason why he could not then comply with the request of the plaintiff, that Borst, from whom he was to have the money, had, after waiting until three o'clock for the plaintiff to come, parted with or made other use of a part of his money. What is that but saying, "It is too late? Up to three o'clock I would have accepted the deed; but now I am not in a situation to do so." This fact the referee has found, but in his conclusion of law ignores it entirely. But without this I am of the opinion that judgment should have been for the defendant, and that no act of the plaintiff, after the time agreed upon for performance had passed, the defendant being at the place ready at the time to perform on his part, could give the plaintiff an action for the damages liquidated by the parties to be paid as the ascertained damages for a default in the performance of the contract.

The judgment must be reversed and a new trial granted, costs to abide the event.

All the judges concurring,

Judgment reversed and new trial ordered.

Ryder v. Hulse.

RYDER, Administrator, v. HULSE.

At common law, a husband is entitled to the personal property and choses in action of his wife, and they are vested in him at her death, whether reduced to possession or not, in virtue of his marital right, and not of his right to administration.

The statutes of 1848 and 1849, for the protection of married women, gave no power to the wife to dispose by will of property acquired by her before the passage of the acts, or of the interest accruing after the acts upon money previously given to her, or of the proceeds of her own labor which her husband permitted her to receive, manage and invest in her own name and as if it were her own property.

Evidence of such a course of dealing by the wife with personal property bequeathed to and earned by her, and her husband's declarations that she could give her money to whom she pleased, only establish an omission to exercise his marital rights in her lifetime, and do not imply a relinquishment of his rights in case of survivorship.

APPEAL from the Supreme Court. The plaintiff, having taken out letters of administration upon the estate of his deceased wife, brought an action to recover certain promissory notes which his wife had bequeathed, by will executed in November, 1856, to the defendant, Miss Hulse, and which the latter had taken into her possession. The plaintiff and the testatrix were married in 1831. Mrs. Ryder had some money at the time of her marriage: prior to 1848 she received a further sum from the estate of her mother. Her husband was a ship carpenter, and was absent from his home a large portion of the time. He owned a farm, upon which his wife resided, and which she managed in his absence. The evidence showed that the eggs, poultry, &c., which the wife raised, were treated by him and her as her private and individual property. She invested the proceeds, with his knowledge and assent, in her own name. The promissory notes in question represented the proceeds of the sales of such small farm products, and of her own money which she had at marriage, and received from her mother's estate, with the interest thereon which she had from

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time to time received and invested in such notes. There was evidence that her husband annually gave her a calf; that they had borne certain household expenses in common, each paying half, and that he had declared that he should give his money to whom he pleased, and Mrs. Ryder could do the same thing with hers.

The plaintiff had judgment in the Supreme Court, and the defendant appealed to this court, where the case was submitted on printed arguments.

Moller & Tutthill, for the appellant.

William P. Buffett, for the respondent.

WRIGHT, J. The property in dispute was derived from three sources: 1st, Money which the deceased had at the time of her marriage with the plaintiff, in 1831; 2d, Either the sum of \$80 or \$180 received from the estate of the mother of the deceased prior to 1848; and 3d, Moneys received by the deceased, during coverture, for butter, poultry, calves, &c., sold from the farm of the plaintiff. These moneys, with the accumulation of interest thereon, were loaned from time to time, by Mrs. Ryder, to divers persons, taking their promissory notes, running in her name; and at her death, in December, 1856, there were eighteen notes of various sums, amounting in the whole to \$1,645. Shortly before her death, the wife made a will, bequeathing the notes, and the money represented by them, to the defendant. The plaintiff claims that the notes belong to him absolutely, with the right of possession as administrator of his wife.

The legal right of the plaintiff to the notes as his property is unquestionable, unless the effect of the statute of 1848 (amended in 1849) "for the more effectual protection of the property of married women," is to subvert such right. At common law, the husband is entitled to the personal property and choses in action of the wife. He may prosecute for them, and take the money recovered to his own use. So, also, he

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may assign them for a valuable consideration, cutting off the wife's right to them in the event of her surviving him, and release and discharge them; subject, however, to the power of a court of equity to compel him to make a suitable provision for her. Should the wife die before the husband, and before the latter recover the choses in action, they would belong to him absolutely; and should he afterwards die, leaving them uncollected, his personal representatives might collect them, as a part of his assets. It is only in the event of the husband dying leaving the wife surviving him, without having reduced her choses in action to possession, and without having assigned or released them, or recovered a judgment or decree in his sole name for the money, that they would survive to her and his representatives have no interest in them. (*Westervelt v. Gregg*, 2 Kern., 202, and cases cited.) So, that independent of the statute above referred to, the plaintiff had an undoubted right to the notes in question as his property, insomuch that had he failed to assert the right in his lifetime, his representatives would have been entitled to collect them as a part of his assets. They cannot be claimed to have been the sole and separate property of the wife, coming by deed, will or other instrument or by implication of law (to which point attention will hereafter be given), but if they had been, she could not have disposed of them by will, without the enabling act of 1849. After the enactment of the Revised Statutes, and before the passage of the act of 1849, a married woman could not dispose of her separate personal estate by an instrument in the nature of a will. (*Wadhams v. American Home Missionary Society*, 2 Kern., 415.)

Now what was the effect of the act of 1848, as amended in 1849, upon the rights of the plaintiff? The second section of the act of 1848 declared that the real and personal property of any female now married shall be her sole and separate property, as if she were a single female, except so far as the same may be liable for the debts of her husband heretofore contracted. (Laws of 1848, ch. 200.) This language is broad enough to embrace all property owned by the wife at the time

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of the marriage, or acquired by her by gift, devise or otherwise during coverture and before the passage of the act, excluding any title or right which the husband had acquired in it by preëxisting laws, saving only the rights of creditors. In short, the effect of the statute was to take away from the husband all right to the personal estate and choses in action of the wife acquired by virtue of the marital relation; and it was so construed in *Westervelt v. Gregg*. Had it therefore been competent for the legislature to enact a law thus affecting existing rights of property, the plaintiff would thereby certainly have been divested of any interest in the personal property of his wife; and the right of reducing her choses in action into possession, or assigning or disposing of them for his own use, or of enjoying them in the event of her death, would have been taken away. That the legislature could not, however, thus interfere with existing rights of property of the husband, was adjudged by this court in *Westervelt v. Gregg*. In that case, and also in several cases in the Supreme Court, it was held that the statute of 1848, so far as it related to existing rights of property, was unconstitutional and void. In *Westervelt v. Gregg*, a legacy of \$5,000 had been given by her father to Mrs. Gregg; and in September, 1846, herself and her husband instituted proceedings before the surrogate of New York for the executor to account and pay over to them the amount of the legacy. Proceedings were continued until September, 1849, when a decree was made declaring that there were moneys in the executor's hands sufficient to pay the legacy, and reserving the question whether it should be paid to Mrs. Gregg or her husband, for further consideration. In November, 1849, the surrogate made a decree that the husband was entitled to recover the amount of the legacy, and directing the executor to pay it to him. On appeal by the executor the decree was affirmed both in the Supreme Court and this court. The grounds of affirmance here were, that at common law the husband was entitled to the choses in action of his wife and had the right to reduce them to possession for his own use; that this was property in the justest sense of the term, deserving

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protection; and that the statute of 1848, which undertook to deprive the husband of it, was in violation of the Constitution of the State which declares that "no person shall be deprived of life, liberty or *property* without due process of law;" (Const., Art. 1, § 6.) The case clearly decides that the husband had such a vested interest in the legacy, as entitled him to recover it to his own use, not merely to collect the money on it, but to appropriate it to his own benefit, and as his own property; yet had he died before the decree of the surrogate, leaving his wife surviving, it would have gone to her, and his representatives have had no interest in it. His right to the legacy was not only vested, but also the right at any time to reduce it to possession for his own use; and these were rights of property (though qualified and conditional in the single respect that they were subject to be defeated by his death leaving them unexercised, and his wife surviving) constitutionally protected against any legislative act aiming at their overthrow or subversion. The effect of the decision was to leave the preëxisting rights of the husband in respect to the wife's personal estate by virtue of the marriage relation, untouched and unaffected by the law of 1848. It was assumed in the case (though not directly a point in judgment) that the choses in action of a wife, by virtue of the marriage relation, belonged to her husband absolutely, in the event of her death; and that the effect of such death was not, by the rules of the common law, to divest the husband of all title to, or property in, them.

The defendant's counsel, however, in the present case, insists that the common law gave the husband no property in a chose in action of his wife, not collected or appropriated to his use in her lifetime, and that if he did not exert the only right which the law vested in him, of collecting the money on it, or otherwise appropriating it to his own benefit by assignment during such lifetime, the right was gone forever. The theory is, that the property is in the wife with the qualified right in the husband to collect and appropriate it to his own benefit in her lifetime, but failing to do so he gets no title to it; but after

her death gets it merely as administrator. If it be true that, by the common law the husband has no vested property in the choses in action of his wife after her death, and that he only acquires a right to such property as her administrator, the right to administer on her estate, if given solely by statute, would not probably be a vested right that could not be taken away by the statute giving her power to make a will. But I cannot agree to this view, which supposes that the wife, after marriage and during coverture, retains such a property in her choses in action as prevents the title to them vesting in her husband. All the personal estate of a wife vests absolutely in her husband at the moment of marriage, and all she acquires during coverture immediately becomes his. This is just as true in respect to her choses in action as of any other species of her personal estate. With regard to the choses in action, she has only a contingent interest in those which her husband has failed to reduce to possession or assign or dispose of in his lifetime. It is because the law makes the husband the owner and vests the title in him, that he is vested with the further right of collecting, assigning and appropriating their proceeds to his own benefit. In the event of the wife's death, the husband does not take the choses in action not then reduced to his possession, as next of kin or under any statute of distributions, but the property is already vested in him, insomuch that should he die before recovering them they would be assets of his estate to be recovered by his representatives, and not by the representatives of the wife. The husband has such a vested interest in them that I entertain no doubt that he may, without or before administration, receive voluntary payment upon and discharge the same. By the prior death of the wife her contingent interest becomes extinct, and that of the husband becomes absolute, with the right of possession as administrator. This was the view taken of the question in *Ransom v. Nichols* (22 N. Y., 110). In that case it was held that all the property in a chose in action of the wife passed to the husband after her death, and that the latter had the right to receive payment upon and discharge the same without administering on his

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wife's estate. This he could not, of course, do, unless title vested absolutely in him upon his wife's death; nor would such a payment and discharge be good if the husband acquires title to the chose in action only by virtue of the letters of administration of the estate of his intestate wife, which the law authorizes him to receive. It is because the husband is the owner of the chose in action that his release or discharge of it would be effectual. If he had no vested interest in it as an incident to, and flowing from, the marriage relation, but his right to administer on his wife's estate gave him the only title to recover and enjoy it as his own, it is very manifest that until the right of administration was exercised, and he thereby acquired the legal title, any voluntary payment to, or discharge by him of, a note or bond of the wife's estate would be invalid. But I do not understand that this would be so, even as to the creditors of the wife.

I have no doubt that the husband has, by the common law, a vested interest in the choses in action of his wife that may not be reduced to his possession or appropriated to his own use in her lifetime. This interest vests at the marriage, continues during coverture, and only ceases in the event of the husband dying, leaving the wife surviving, without having reduced the choses in action to his possession, or appropriated them to his own benefit in his lifetime. If he survives his wife, they belong to him absolutely. This is such a vested right as the legislature could not take away, any more than it could the right of the husband to recover and appropriate to his own use, such choses in action in the lifetime of the wife.

The plaintiff, in the present case, was entitled to the notes in controversy as his property. It can make no difference that the statute of 1849 empowered a married woman to will away her sole and separate property acquired under such act. If the legislature could not take away from the husband and give to her what by preëxisting law he was entitled to, and he was the owner of the notes, no will that she might assume to make would pass any interest in them. A married woman

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cannot effectually bequeath property that she may not hold or take under the statute of 1848.

2. A remaining question to be considered is, whether the notes were the sole and separate property of Mrs. Ryder at her decease, irrespective of the statute of 1848. There is no pretext of any express settlement on the wife by deed or other instrument. Did they become her separate property by implication of law? The small sum of money which the wife had at the time of her marriage, and that which she received from the estate of her mother before 1848, with the accruing interest thereon, were subject to the marital rights of the husband, and he could at any time have collected and appropriated those moneys to his own use, and they were his absolutely in the event of her death. With regard to the proceeds of articles sold by the wife from his farm, they were in every sense his property; and the largest proportion of the funds embraced in the notes were derived from such sales. It is upon the assumption that the husband was the owner of the property, that it can be pretended at all that the wife acquired any separate estate in it. She got none by the act of 1848, nor from any person other than her husband. If she had any separate estate she could only have got it by the husband divesting himself of the property and engaging to hold it as a trustee for her separate use. This he might do as was said in *McLean v. Longlands* (5 Ves., 79), "by a clear irrevocable gift, either to some person as trustee, or by some clear and distinct act of his." Other declarations of an intention, or of a disposition of property to the use of the wife, could not be sufficient. Now was there any clear distinct act of the plaintiff in this case divesting himself of the property and engaging to hold it as trustee of his wife for her separate use? None, in my judgment, was shown by the evidence. He allowed her to retain the money belonging to her at marriage, and subsequently received from the estate of her mother, without asserting his marital rights; and suffered her to loan those moneys, together with moneys received for the products of his own farm to whoever she pleased, and upon such terms

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and securities as she pleased; to take the securities payable to herself, and to receive and reinvest the moneys from time to time. But there is no proof of any gift, or of any distinct affirmative act of the plaintiff divesting himself of, or setting apart any portion of, the property to the wife's separate use. All that can be said is, that he omitted to assert his marital rights during coverture in respect to the moneys of his wife, and allowed her to manage and control a part of his own property as if she were a *feme sole*. The fact that he suffered her to treat and deal with her personal property as her own, is in no wise inconsistent with an intention on his part to claim it and assert his marital rights to it in the event of his surviving her; and because she managed his farm in his absence, disposing of its products, and even, with his assent, loaning the proceeds upon promissory notes running in her name, such property was not thereby converted into the separate estate of the wife. It is true that a part of these proceeds were the fruits of her own labor; but that gave her no separate estate in those accruing after the statute of 1848, by force of such statute. Under that statute the property she may take and hold must be acquired by inheritance, gift, grant, devise or bequest from some person other than her husband. There is no proof in the case of any gift of these moneys to the wife, or any satisfactory proof of any distinct unequivocal act of the husband divesting himself of, and engaging to hold them, as her trustee. It cannot be, that because a husband suffers his wife to manage and deal with his estate as though it were her own, that he divests himself of ownership and assumes the character of her trustee to hold it to her use.

I think the judgment of the Supreme Court should be affirmed.

All the judges concurring (except SELDEN, CH. J., who was absent),

Judgment affirmed.

Sherman v. Elder.

SHERMAN v. ELDER *et al.*

A wife, by allowing chattels belonging to her, and which remain *in specie*, to be employed by her husband in the carrying on of a business for their common benefit, does not devote them to her husband so as to render them liable for his debts.

Otherwise, *it seems*, as to articles used by the husband as merchandise, whether a part of the goods belonging to the wife before marriage, or purchased out of the earnings and accumulations of the business: *Per ALLEN, J.*

An assignment by the wife of the goods and chattels, "as well as all claims and demands for any portion of them," is valid, and carries the right of action for the taking by a creditor of that part of her property which remained *in specie* and was not made merchandise, though used by the husband in his business.

APPEAL from the New York Common Pleas. Action by the assignee of Mrs. Lucy Sherwood for the taking and conversion of chattels alleged to be on her premises and in her possession. On the trial before a referee, it appeared that Mrs. Sherwood married in 1850, being then engaged in business as a grocer, owning the fixtures of her shop and the stock in trade. Upon her marriage, it was agreed that the business should be continued in her name; that her husband should give his services in the business, and that he should have his living as his compensation. He was a bankrupt. He bought and sold and gat gains for a time, dealing in the name of his wife, and employing the profits (except what was expended in the support of the two) in adding to the stock in trade, and in improving the leasehold premises in which the business was carried on. The business finally proved a bad one. The husband confessed a judgment for the price of goods which he had bought to replenish the store, and for which he had given a note in the name of his wife. Execution on that judgment was levied upon all the stock in trade of Mrs. Sherwood, and it was sold. The only question in this case arises in respect to certain fixtures, shelves, beer-pump, cans, weights,

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demijohns, clocks, decanters, &c., &c., which were used in the business at the time of Mrs. Sherwood's marriage, and had remained *in specie*, and were sold by the sheriff. The value of the property thus clearly distinguishable, and used not as merchandise but as apparatus for the business, was found to be sixty dollars. The referee made a report denying the right of the plaintiff to recover for the taking of this property, and judgment was entered for the defendant. The plaintiff appealed to this court.

Matthews & Swan, for the appellant.

R. M. Harrington, for the respondents.

ALLEN, J. The referee finds that a part of the property, taken and sold by the defendants on the execution against Daniel Sherwood, belonged to the wife of the judgment-debtor before and at the time of her intermarriage with such debtor, and he values that part of the property at sixty dollars. He reports against the right of the plaintiff, claiming, as assignee of the wife, to recover for this portion of the property, on the ground, 1st, that the assignment of the claim in controversy by Lucy Sherwood was not valid in law, she being a married woman; and 2dly, because no damages arising from the sale or conversion of the property mentioned in the complaint were included in the assignment to the plaintiff. This report and decision was made in obedience to a decision of the Court of Common Pleas of the city of New York, setting aside a former report of the same referee, and granting a new trial in the action.

The judgment of the referee was affirmed by the Court of Common Pleas upon the ground and for the reason, as assigned, that Mrs. Sherwood must be regarded as having devoted or dedicated to her husband the property which was hers at the time of her marriage. This portion of the property does not, as I understand the case, include any part of the stock in trade, the goods and groceries which were the subject of traffic, and which were mingled with goods purchased for sale after the

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marriage and made a part of the trading or business capital; as the business was carried on after the marriage; but consisted of fixtures and articles of furniture kept for use and easily distinguishable from the mass of property in the store or grocery kept and managed by the husband in the name of the wife. As to property of that character declared by law to be the separate property of the wife, in the use of it by the wife in connection with her husband, and for their joint benefit during coverture, I see no evidence of "dedication and devotion" to the husband. Living with her husband, she can only use it with him and for the benefit of both, and by its use no fraud is perpetrated and the creditors of the husband suffer no wrong. (*Merritt v. Lyon*, 3 Barb., 110.) If by any act of hers she has estopped herself from claiming the property as against the sheriff and the judgment creditors of her husband, such acts may be shown upon another trial, and the assignee will be barred of his action. There is some evidence tending to show that the property was taken without objection from her after she was asked by the sheriff to select the property she owned at the time of her marriage from the residue, and told that such property would not be taken. The evidence upon this point is conflicting, and the referee has not passed upon it. In regard to the rest of the property, that which was used by the husband as merchandise in the business carried on by him in the name of his wife, whether a part of the goods which were the property of the wife before marriage or bought subsequently by the husband on credit, or with the profits of the business and the earnings and accumulations of the husband in the business, I agree with the court below that they must be considered the property of the husband and liable to his debts.

The action is trespass *de bonis asportatis*; the complaint alleging the taking and carrying away of the goods and chattels from the premises and possession of Lucy Sherwood, and the sale and disposal thereof by the defendants. The sale of the goods was in September, 1858; and then the causes of action; if any, accrued to Mrs. Sherwood. The assignment to the

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plaintiff was in April, 1854, and transferred the "goods and chattels as well as all claims and demands for any portion of them against Elder and Painter," two of the defendants.

1. A right of action for the taking and conversion of personal property is assignable, and the assignor may recover the value of the property in his own name. (*McKee v. Judd*, 2 Kern., 622; *Butler v. N. Y. & E. R. R. Co.*, 22 Barb., 110.)

2d. An assignment of the property by name after the conversion, carries the right of action for the conversion, *ut res magis valeat quam pereat*. Courts will give effect to a transaction if possible, and so construe an instrument as to give effect to the intent of the parties. In *Waldron v. Willard* (17 N. Y., 466), goods in charge of a common carrier having been damaged were sold by him. The owner assigned "all his interest in the goods" to the plaintiff, and it was held a valid assignment of the right of action against the carrier for non-delivery under his contract. Here, however, the assignment not only transferred the goods but all "claims and demands for" them, and thus in terms included the right of action, certainly against two of the defendants. By the act of 1848, as amended in 1849 (Laws of 1848, p. 307, ch. 200; Laws of 1849, p. 528, ch. 375), the goods and property which belonged to Mrs. Sherwood at the time of her marriage, were not subject to the disposal of her husband or liable for his debts, but "continued her sole and separate property as if she were a single female." These acts demand a liberal construction to carry into effect the beneficent intent of the legislature. The design was not to render the property inalienable during coverture, but to secure to the wife the beneficial use of it. In respect to property owned by her at the time of the marriage, it relieved her from the common-law disabilities incident to coverture, and continued to her her rights as if she had remained sole. The property continued "her sole and separate property;" that is, her property absolutely and with all the incidents of property, and as "if she were a single female." Property considered as an exclusive right to things contains not only a right to use them but a right to dispose of them either by exchange-

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ing them for other things or by giving them away to any other person without any consideration, or even throwing them away. The property continues in her without qualification, and with all the rights which a *feme sole* or other person not under disability could take or enjoy in respect to it. The act of 1849 expressly confers upon a married woman the right to hold and convey property received by gift, devise or grant from any person other than her husband, and this, with the succeeding very liberal legislation in behalf of married women, shows very clearly that it was not in the mind of the legislature to qualify the property that was continued in women after marriage, or restrict them in the enjoyment or disposal of their separate estate. That a married woman may effectually dispose of property which is either hers, or treated by her husband as hers, is clearly to be implied from the case of *Edgerton v. Thomas* (5 Seld., 40). There a mortgage by the wife of the husband's goods was holden valid, the husband standing by and assenting to it. The assent of the husband was only important as estopping him from claiming the goods as his own, after permitting the wife to deal with them as hers. To give the statute a more limited construction would be to add to the disabilities of the wife; for then, her property could neither be applied by her husband nor by herself for her benefit, to supply her wants or minister to her comforts. The statute gives her the property, and she takes it with all the incidents of ownership absolute and unqualified. Her assignment was therefore valid, and, as we have seen, it carried with it the right of action against the defendants. Upon the facts as found by the referee as to the sixty dollars' worth of property belonging to the wife at her marriage with Sherwood, the judgment of the court below was wrong. It must therefore be reversed, and a new trial granted; costs to abide event.

WRIGHT, J., dissented; all the other judges concurring,

Judgment reversed, and a new trial ordered.

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DAVIS v. SPENCER.

The jurisdiction given to the County Courts for the custody of habitual drunkards (Code, § 30, sub. 8) is general, not limited to those having estates of less than \$250.

The reference in subdivision eleven of the same section to the powers of the old Courts of Common Pleas in this matter does not limit the effect of subdivision eight, but was intended to continue in the County Court cases then pending in the Common Pleas.

An agreement between the payee of a note and the maker, made with the assent of the latter's partner, to apply the indebtedness of the payee to such maker and his partner in payment of the note, operates in *presenti* as a satisfaction of the note *pro tanto*.

Whether the assent of the partner was necessary or material: *Quære*.

ACTION by the plaintiff as the committee of Alva Davis, an habitual drunkard, on two joint and several promissory notes made by the defendant and one John A. Williams, and payable to Alva Davis or bearer. The value of the estate of Alva Davis was several thousand dollars, and the plaintiff was appointed committee of his estate by the County Court of Tompkins county. The plaintiff gave in evidence the proceedings in the County Court and his appointment as committee, and that he gave the requisite security and had entered upon the discharge of his duties. Among other objections to the proceedings, and the title of the plaintiff as committee, the want of jurisdiction in the court to entertain the proceedings was urged, upon the ground that the value of the estate of the individual proceeded against exceeded \$250. Upon the trial the co-maker of the note was sworn as a witness in behalf of the defendant, and testified that the payee of the note was indebted to him, and also to himself and a former partner, for professional services to an amount exceeding the notes in suit: that after the notes became due, and before the institution of the proceedings for the appointment of a committee of his person and estate, the payee called on him and desired to have the notes arranged, saying that the defendant had gone

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to New York, and he, Williams, would have to pay the notes or get it out of the defendant, to which Williams replied that the defendant was good, and that if he had to pay the notes he would do it; that he would apply the account he had against the payee and if there was any balance against him he would pay it, and if there was any balance in his favor the payee of the notes should pay it. The payee said, "very well, any way to get my pay." There was some evidence of an assent of the partner of Williams to this arrangement, and that the plaintiff, on his appointment as committee, was informed of what had passed and did not dissent from the arrangement to set off the one claim against the other.

The action was tried by a referee, who, among other facts, found that the payee of the notes was indebted to Williams, or to him and his partner, in amounts exceeding the notes, and that so much of that indebtedness as was necessary for that purpose "was applied, on or about the 12th day of January, 1854, before the appointment of said committee, and before the commencement of this action, to the payment and satisfaction of the notes in suit, by an agreement and arrangement between the said John A. Williams and the said Alva Davis to that effect." He also found the assent of the partner of Williams to that application, and that the plaintiff after his appointment was informed of the arrangement and assented to it. As matter of law the referee decided that the notes had been fully paid, satisfied and discharged, and gave judgment for the defendant. The Supreme Court in the sixth district, without considering the ground upon which the decision was placed by the referee, affirmed the judgment for the reason that the County Court had no jurisdiction in the proceedings for the appointment of the committee.

From that judgment the plaintiff appealed to this court. The cause was submitted on printed briefs.

Samuel Love, for the appellant.

Boardman & Finch, for the respondent.

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ALLEN, J. The judgment cannot be sustained upon the ground upon which it was put by the court below. By the Revised Statutes the Chancellor was charged with the care and custody of the personal estate of all idiots, lunatics, persons of unsound mind and persons incapable of conducting their own affairs in consequence of habitual drunkenness. (2 R. S., p. 52, § 1.) The jurisdiction of the Court of Chancery was a statutory jurisdiction and was exercised principally under the statutes conferring and regulating it. The court originally took jurisdiction of idiots and lunatics as the general delegate of the authority of the Crown as *parens patriæ*, and by a special authority of the Crown under its sign manual. The jurisdiction was not inherent in the Court of Chancery, or the Chancellor as Chancellor. (2 Story Eq. Jur., §§ 1862-1864, 1885-1887.) The jurisdiction conferred upon the Court of Common Pleas, and in vacation upon the first judge of the county, to take jurisdiction of applications in cases of habitual drunkards made by the overseer of the poor, when the property of the drunkard was less than \$250 in value, did not interfere with or divest the jurisdiction conferred generally upon the Chancellor, but simply authorized a special proceeding in a single and special case. (2 R. S., p. 52, §§ 2-4.) The power of the Court of Chancery in these cases, from its long exercise, came to be regarded as a branch of its equity jurisdiction, and as of kin to that exercised by it over infants and others, the wards of the court. Under the Constitution of 1846 an entire new distribution of judicial powers was authorized, and the Court of Chancery was abolished and its powers were delegated to other tribunals. General jurisdiction in law and equity was conferred upon the Supreme Court, and the legislature was authorized to confer equity jurisdiction in special cases upon the county judge, and it was provided that the County Court should have jurisdiction in special cases as the legislature might prescribe. (Const., Art. 5, §§ 3, 14.) In pursuance of this authority, in the first organization of the judiciary and the distribution of judicial power, the legislature, in the "judiciary act" of 1847, enacted that the County Court should have

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equity jurisdiction, amongst other things, "for the care and custody of lunatics and habitual drunkards residing in the county." (Sess. Laws of 1847, p. 828, § 31.) This act in respect to other parts of the jurisdiction conferred on the County Courts, and within the same reason as this particular branch, to wit, the foreclosure of mortgages, partitions, &c., has been held to be constitutional. (*Doubleday v. Heath*, 16 N. Y., 80; *Arnold v. Rees*, 18 id., 57; *Benson v. Cromwell*, 26 Barb., 218.) The Code, taking the place of the judiciary act, gave the County Court jurisdiction in several special cases, and, among others, "the care and custody of the person and estate of a lunatic or person of unsound mind, or an habitual drunkard residing within the county." (Code, § 30, sub. 8.) There is no restriction upon the jurisdiction, and the only condition imposed is the residence of the person proceeded against within the county. In all other respects the jurisdiction is concurrent with that of the Supreme Court. It was not intended to continue the special and limited jurisdiction of the Common Pleas concerning habitual drunkards. It is conferred in different terms with a different limitation and embraces other objects, to wit, all persons of unsound mind as well as drunkards. If the limit to the jurisdiction of the Common Pleas, as regarded proceedings against habitual drunkards, is deemed to attach to the same jurisdiction transferred to the County Court, the anomaly will exist of a jurisdiction conferred by the same clause and in the same words embracing two distinct matters, but of the same general character, in respect to one of which however it will be confined to cases where property of less value than \$250 is involved; and as to the other, there will be no such limitation. The anomaly will not be the less remarkable from the fact that no reference is made in the act to the value of property as an element of jurisdiction. The reference in the 11th subdivision of the same section, to the powers conferred upon the Common Pleas, and the judges thereof, respecting habitual drunkards, was not designed and cannot have the effect to qualify the jurisdiction conferred in other and more absolute

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and unqualified terms by the former subdivision. The subject of habitual drunkards was unnecessarily mentioned in subdivision 11, so far as proceedings thereafter to be commenced are concerned, but they were referred to for greater caution and to continue in the County Court, cases and proceedings which might have been commenced in the Common Pleas or before the first judge thereof; and for that purpose the reference to it may have been well. The County Court doubtless had jurisdiction to issue the commission and appoint the committee.

The judgment must be sustained, if at all, upon the report of and for the reasons assigned by the referee. The grant of general jurisdiction in the special cases mentioned by section 30 of the Code is utterly repugnant to the idea of a simple continuation and transfer of the restricted and very special jurisdiction of the Common Pleas under the Revised Statutes, and is not therefore affected by the saving provision of section 471 of the Code.

The referee has passed upon the question of fact involved in the issue, and if there was any evidence his conclusions of fact are not reviewable by this court. They were not reviewed by the Supreme Court, by which tribunal alone they were reviewable. If there was no evidence, the decision would be erroneous in law. COMSTOCK, J., in *Hoyt v. Thompson's Executor*, 19 N. Y., 212, says: "Questions of fact are not before us." * * "The distinction is, that the subordinate courts, in reviewing trials have the power of passing upon questions of fact as well as law, while the office of this court is to correct errors of law only." The referee has found an application of the indebtedness of Alva Davis to Williams, or Williams and Burger, with the assent of Burger, to the payment and satisfaction of the notes in suit. Upon that fact he predicates his conclusion of law that the notes were fully paid, satisfied and discharged. There was no error in the legal conclusion of the referee assuming the fact upon which it rested to have been established. Comyn's Digest, Accord, B. 4, lays down the proposition that "an accord with mutual provisions to perform

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is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance." This is not inconsistent with the principle that an accord, to bar an action, must be executed. The mutual promises are regarded as the execution of the accord, the satisfaction of the original contract contemplated by the parties. An agreement that a debt due or to become due shall be deemed *pro tanto*, a payment on a debt due from the creditor, operates as a satisfaction. Nothing further is to be done by the parties in execution of the agreement; the debt is in judgment of law satisfied. When, by an agreement under seal between A and B, a controversy between them was submitted to arbitration, and it was agreed that the sum to be awarded by the arbitrators in favor of B should be credited on a note which A held against B, it was held that the amount and award operated as a satisfaction *pro tanto* of the note. (*Hunt v. Clark*, 12 John., 374.) So an agreement made after the giving of a note that a debt contemplated to be contracted by the payee with a third person, should be allowed in payment of the note, is a valid agreement, and the debt when contracted may be shown in payment of the note under the general issue. (*Eaves v. Henderson*, 17 Wend., 190.) Formerly there appears to have been a doubt whether an agreement to set off precedent debts operated as a payment, satisfaction or extinguishment. An accord that each of the parties should be quit of actions against the other was said not to be good because it was not any satisfaction. (Bac. Abr., Accord, a.) But there is no difference in principle between an agreement concerning debts, one of which is to be contracted in the future as in *Eaves v. Henderson*, and an agreement concerning debts already existing; and it has been decided that an agreement to discontinue and a discontinuance of cross actions for false imprisonment constitute an accord and satisfaction, and bar another action by either. (*Foster v. Trull*, 12 John., 456.) Whenever a valid new contract is substituted in the place of the old, as the referee has found was done in this case, an action will not lie upon the old contract, but the remedy of the parties is on the new or substituted agreement, although

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the transaction may not amount to a technical accord and satisfaction. (*Good v. Cheesman*, 2 B. & Ad., 328.) Where two brothers, A and B, principal and surety in an annuity, had, in an agreement between them and a third brother for the settlement of their affairs, declared that the bond was the debt of B, the surety, it was held that this agreement, whether subsequently acted upon or not, was a binding accord between A and B. (*Cartwright v. Cooke*, 3 B. & Ad., 701.) *Hills v. Mesnard* (10 Ad. & E. N. S., 266), is in principle not unlike *Eaves v. Henderson* (*supra*). The action was by payers against acceptors of a bill. The defendants became the acceptors for the accommodation of one Hundle, and the plaintiffs, the payees, agreed to appropriate certain moneys which they expected to receive in discharge of the bill. They subsequently received the money and the court held it a payment of the bill *pro tanto*. Lord DENMAN, Ch. J., says: it was competent for the parties to agree beforehand that the money should be specifically applied to the discharge of the liability on the bill *pro tanto*, "and it seems to be the good sense of the transaction to treat it as so much money paid to the plaintiffs by Hundle on their account and as their agent."

Gardiner v. Callender (12 Pick., 374), is in point and decides that when E. H. R., one of the executors of A. S., gave to the executors of W. P. a memorandum as follows: "It is agreed that the sum of \$3,235, due from E. H. R. to the estate of W. P., shall be applied on a certain note for \$8,000 now held by the representatives of A. S.," the memorandum amounted to a payment on the note and was not merely an executory agreement. The fact that a memorandum in writing was made of the agreement, does not vary its legal effect. It was not required by any law to be in writing. The court, as in *Hills v. Mesnard*, sought the good sense of the transaction, and to give effect to the sensible arrangement of the parties, holding that it could not be necessary in order to connect the one debt with the other by an agreement *in presenti*, that there should be the vain formality of passing the money from one party to the other and returning it again to the party from whom it just

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came, or that a formal release or receipt should be executed. This case is not cited by counsel or alluded to by the court in the subsequent case of *Cary v. Bancroft* (14 Pick., 315), but the latter was decided upon a ground which distinguished it from the former case; the court holding in the case last cited that the agreement was executory and not executed, requiring some further act to be done before the one note would operate as payment or extinguishment *pro tanto* of the other. *Dehon v. Stetson* (9 Met., 341), followed *Cary v. Bancroft*, and was decided upon the same ground. Another point was in the case, to wit: that one of the partners interested in the debt which it was sought to apply in payment as the individual debt of one of his partners, had not been consulted, and had no knowledge of the contemplated arrangement. Whether such consent was material or necessary is doubtful. See *Wallace v. Kelsall* (7 M. & W., 264), in which it was held, that to an action by three plaintiffs for a joint demand, a plea of an accord and satisfaction with one of the plaintiffs by a part payment in cash and a set-off of a debt due from that one to the defendant, was good without alleging any authority from the other two plaintiffs to make the settlement.

There was some evidence tending to prove the fact found by the referee. Evidence was given of the negotiation between the parties upon the subject, and what each party said, and that all parties had acquiesced in the arrangement, or without any arrangement had suffered the debts to remain as they were, without attempting to enforce them for several years. Whether the minds of the parties met upon any terms, and if so what were the terms of such *aggregatio mentium* was a question of fact for the referee, whose conclusions are final in this court, not having been reviewed by the court below. He has found upon the evidence that the parties did agree that the mutual debts should be applied in cancelment and discharge of each other, so far as they equaled each other in amount and to the amount of the smallest, and that without any further action by them—that is, that the agreement was executed, not executory. Whatever might be our conclusions upon the evidence, were

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we called upon to pass upon and declare the effect of it, we cannot say there was no evidence. Not only was there some evidence, but it was as strong, if full effect is given to the language proved by the witness, as it was in *Gardner v. Callender*.

The judgment must be affirmed.

DAVIES, J., also delivered an opinion for affirmance, and all the judges concurred.

Judgment affirmed.

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MORRIS *et al.*, Administrators, v. PATCHIN.

The attestation of a judgment of a State court, in order to make it evidence in another State, under the act of Congress, must be signed by the clerk: the attestation of a deputy-clerk is insufficient.

Such a defect is not cured by the certificate of the presiding magistrate of the State court that the attestation is in due form, and authorized by the State law. It is immaterial that the attestation conforms to the law of the State: it must conform to the act of Congress.

In order to make the record of a judgment evidence, it must be signed by the officer authorized by law, and must have been filed in the proper office. Where the record itself fails to show these essentials to its validity, it seems that it is inadmissible to sustain process founded thereon, even though attested in the manner required by the act of Congress to authenticate a judgment.

APPEAL from the Supreme Court. The judgment involves only questions of evidence. On the trial, copies of several records of courts in the State of Ohio were offered in evidence certified to be copies in the name of the clerk by a deputy; the deputy signing the name of the clerk, with the addition of his title, adding, "By F. S. Smith, Deputy Clerk." The presiding judge of the court added his certificate that the individual named in the certificate as clerk was such clerk, and had the custody of the original record of the court, and that the person signing the certificate as deputy clerk was such

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deputy "duly appointed and qualified, and authorized by the laws of the State of Ohio to certify as aforesaid, and that said attestation to said copy of said record is in due form of law."

Objection was taken that the copies were not attested by the clerk of the court as required by the act of Congress, and that an attestation by a deputy clerk did not entitle them to be read in evidence. This objection was overruled, and the record admitted. There was another question of evidence which is sufficiently stated in the following opinion. The plaintiff had a verdict and judgment, and it having been affirmed at general term, the defendant appealed to this court.

Frederic E. Cornwell, for the appellant.

A. P. Laning, for the respondents.

ALLEN, J. The act of Congress provides that "the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States by the attestations of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form." (Act of May 26, 1790, § 1; 1 Story Laws U. S., 93.) This act was passed pursuant to the Constitution, conferring the power upon Congress to prescribe the manner in which public acts, records and judicial proceedings of one State shall be proved in any other State and the effect to be given to them. (Const. U. S., art. 4, § 1.)

The act prescribes the persons by whom the records shall be attested, but the form of the attestation, and that alone, is not prescribed, but must conform to the usage of the State in which the record is and not to that of the United States or of the State in which it is to be used as evidence. The presiding judge can alone certify, and the record is not well proved by a certificate by any other judge of the same court, although of equal authority and rank within the State. It must appear by the certificate that the judge is not only "a" judge of the

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court, but that he is "the chief judge or presiding magistrate," when there are more judges than one of the court from which the record emanates. (Cow. & Hill's Notes, p. 1181, note 771, and cases cited.) In *Stephens v. Bannister* (8 Bibb, 869), it was held that a record for the court of the district of Union, South Carolina, with the ordinary clerk's certificate under the seal of the court, certified to be in due form by two judges, one stating himself to be the judge "that presided, and one of the judges of the Supreme Court of law of said State," and the other stating himself to be the "senior judge of the court of law of said State," was not sufficiently authenticated.

So, too, the attestation is directed to be by the clerk, and not by any person acting as a substitute for the clerk, or possessing like power under the State laws. In making the certificate, which is made evidence under the act of Congress, the clerk derives his authority from the Federal and not from the State laws, and the certificate has vitality and effect, not by reason of the official character of the officer making it under the laws of the State, but in virtue of the act of Congress prescribing it as the mode of proof in this particular case. The certificate of the judge is as to the form of the attestation; that is, that, in the attestation the forms in use in the State from which the record comes have been observed. (*Ferguson v. Harwood*, 7 Cranch, 408; Conk. Treat., 2 Ed., p. 240.) It is made necessary, because the courts of one State cannot officially know the forms of another State. (*Smith v. Blagge*, 1 Johns. Ca., 289.) The certificate of the judge as prescribed by the act of Congress, is, that the attestation of the clerk is in due form, and he is not authorized to certify that the certificate of any other person is of equal validity with that of the clerk in the State when made. The form of the attestation is one thing, the person by whom it is made quite another; the certificate of the judge determines the sufficiency of the former, the statute alone declares the latter. Prof. Greenleaf lays down the rule that the clerk alone can certify under this statute, and that the certificate of his under-clerk in his absence is incompetent (1 Greenl. Ev., § 506); and to this he cites *Sampson v. Overton*

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(4 Bibb., 409). The certificate of the judge as to the authority of any person other than the clerk to make the certificate, is of no more force than would be a like certificate as to the effect of the judgment. Again, if a deputy clerk or other person could make the certificate by reason of the power conferred upon him by the State laws, and thus satisfy the act of Congress, such law should be proved as other facts are proved or as other laws are proved, and not by the certificate of the judge, which is not made evidence of any such fact. The records were not competent evidence and were improperly admitted.

Another objection to the records was, that they did not purport to have been signed by any judge of the court or by any other officer, and it did not appear that they had been filed in the proper office or in any office.

The third and tenth sections of the statute of Ohio, passed in 1853, and given in evidence, transfer the business from the Superior Court of Cleveland, to the Common Pleas of Cuyahoga county, and provided for a signing of the record of judgment by a judge of the Court of Common Pleas in all cases where a complete record thereof had been made in the Supreme Court, but not signed by a judge thereof, as well as when a cause had been disposed of in said court, of which a complete record had not been made. The cause or proceeding against the steamboat appears to have been disposed of by the Superior Court in 1852, but when the record thereof was made or filed does not appear. It is not signed either by a judge of the Superior Court or Court of Common Pleas. It would seem from the certificate of the clerk, to be one of that class of cases transferred to the Common Pleas, in which a complete record had been made, but which lacked the signature of the judge to make it perfect as a record of the judgment. The record of the other judgment is from the Court of Common Pleas and is not signed, and does not appear ever to have been filed, except as it is certified to have been copied from the record of the court. I infer that it is a record already made up, and only lacking the signature of the judge to make it perfect and

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entitle it to be filed as a judgment record, upon which final process may issue. It certainly should appear in some way that the records were records of judgment, valid as such, and that they were on file before the final process issued upon them, especially as to the judgment against the steamer, the return of the final process upon which unsatisfied is relied upon as a breach of the condition of the bond for the return of the vessel. A transcript of the proceedings or a history of the action does not become a record, until it has been signed by the officer designated by statute. The forms prescribed by law for evidencing and perpetuating the evidence of the judgment of the court must be pursued. (*Marvin v. Herrick*, 5 Wend., 109; *Barrie v. Dana*, 20 John., 307; *Butler v. Lewis*, C. P., 10 Wend., 541; *McDonald v. Bunn*, 8 Denio, 45; *Rex v. Smith*, 8 B. & C., 341; 1 Arch. Pr., 485, 9 Ed.) The papers were imperfect as records of judgment and should have been excluded. Not having been signed or filed as required by law, they did not authorize the issuing of executions founded thereon. (See cases cited before.) It is possible that because they had not been signed they had not been filed as judgment records, but were simply a part of the ordinary files of the court awaiting the signature of the judge. For these errors of the learned justice upon the trial, the judgment must be reversed.

All the judges concurring,

Judgment reversed, and a new trial ordered.

END OF CASES DECIDED AT MARSH TREEN.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,
June Term, 1893.

MULLINS, Jr., v. THE PEOPLE.

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A common-law *certiorari* to review a summary conviction under a penal statute brings up, not only questions affecting the jurisdiction of the magistrate and the regularity of the proceedings, but the question whether there was any evidence to warrant the conviction.

In such cases, the evidence must appear on the face of the record, or the conviction will be quashed.

The act in relation to the sale of bottles, &c. (ch. 117 of 1860), imposes no penalty for the secreting of a bottle, though subjecting a dealer in bottles to a search-warrant.

APPEAL from the Supreme Court. Mullins, a junk-dealer in the city of New York, was proceeded against, before a magistrate of that city, under a complaint that he had in his possession, secreted, a number of bottles which were stamped with the name of one Knebel, the complainant, who was engaged in the manufacture, bottling and vending of soda-water, ale, cider, &c., and that such bottles were "being sold, disposed of, bought and trafficked in by said Mullins." A search-warrant was issued, and the officer charged with its execution having found one bottle stamped with Knebel's mark on

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Mullins' premises, he brought the latter before the magistrate, as directed by the warrant. The evidence, in addition to the formal proof that Knebel had filed the requisite descriptions of his mark, and had given notice thereof in two newspapers, was that of the constable, who testified that he "found the bottle at the bottom of a barrel where there were one hundred bottles or more of different marks;" that "the barrel stood in a yard where there were three or four thousand bottles, and the defendant was a junk-dealer selling second-hand bottles." The magistrate convicted the defendant and imposed a fine upon him of fifty cents, in default of payment of which he was committed to jail for fifteen days. The defendant having sued out a *certiorari*, the proceedings, including the evidence, were returned to the Supreme Court, which, at a general term in the first district, reversed the conviction, and an appeal was brought to this court.

T. T. C. Buckley, for the appellants.

J. Paulding, for the respondent.

SELDEN, Ch. J. It must be conceded that the statute under which the respondent was convicted before the justice is peculiar in its provisions, and bears palpable evidence upon its face of having been framed without that care and caution which should attend the enactment of a penal law. The respondent insists that the act is unconstitutional. This, however, depends, in a great degree, upon the construction which is given to it. The first section, which simply authorizes all persons engaged in the manufacture and sale of mineral waters, &c., in bottles with names or marks thereon, to record and publish such names or marks, is, of course, without objection.

The second section, as amended by the act of 1860, declares it to be unlawful, without the written consent of the owner, "to fill with mineral waters, or other beverage, any such bottle so marked or stamped, or to sell, dispose of, buy or traffic in, any such bottles so marked or stamped by him, her or them

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of such owner thereof;" and imposes a penalty of fifty cents for every violation of the enactment. This section is very awkwardly framed, and would, if literally construed, be entirely self-destructive. It could not, of course, have been intended to require the owner of the bottle to procure his own written consent to its use or sale. This would be absurd. The manufacturer, for whose protection the statute was passed, might clearly fill his bottles, and sell them, with their contents, without any written consent from himself. When he has done this, the purchaser becomes "the owner" of the bottle, and is, therefore, according to the terms of the act, the party whose written consent is requisite to any subsequent use or sale. But his written consent could be no more essential to a sale by himself, than that of the manufacturer to the original sale; nor would it afford any protection to the manufacturer to require it. This, therefore, cannot be the true construction of the provision.

The only mode in which the statute can be made to effect the object of its enactment is, to interpret the word "owner" as referring exclusively to the original owner whose name or mark is upon the bottle; and the prohibition to extend only to a use or sale by, or a purchase from, a person other than such original owner. Thus interpreted, the provision is entirely unobjectionable, and would accomplish precisely what the legislature no doubt intended.

But, to warrant conviction and punishment under this section, the offence must be proved. The record in this case shows that Mullins was convicted by the justice of having violated the provisions of the act, in having "secreted" the bottle, marked and stamped as described, upon his premises, and in having "sold, disposed of, bought or trafficked" in the bottles of the complainant. Now it is plain that the secreting of bottles cannot subject a party to a conviction under the act. It authorizes the issue of a search-warrant for the purpose of finding the bottles; but no other penalty is attached to the act of secreting. This act is not mentioned or alluded to in the second section, which alone imposes the penalty. To

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justify the imposition of a fine or imprisonment, the party charged must be shown to have violated the provisions of this section. Mullins was convicted under those provisions of having "sold, disposed of, bought or trafficked in" the bottles of Knebel. The only evidence to support this conviction was the fact that one bottle with Knebel's mark was found at the bottom of a barrel of bottles upon his premises, and that he was a dealer in old bottles. If this could be supposed to prove either of the acts with which he was charged, it must be that of having unlawfully bought the bottle. It could not prove that he had sold or trafficked in the bottles of Knebel, as it had no tendency to show that he ever had any other in his possession than the one found. But how could the fact of the finding of this bottle upon his premises prove that he had bought it of some person other than Knebel himself, which, upon our construction of the act, it was essential to establish? The presumption provided for in the first clause of the third section of the act does not arise, as that attaches only upon proof of the use of the bottles for the sale of mineral waters; and of this there was no evidence. At common law the presumption from the facts proved would clearly be that Mullins came lawfully into possession of the bottle. Hence, although, in view of the interpretation which I have given to the statute, there is no objection to its constitutionality, still I see no evidence in the case upon which the conviction can properly rest; and the only doubt which can exist as to the propriety of its reversal by the Supreme Court arises, as I think, upon the question whether the error can be corrected upon a *certiorari*, issued, not pursuant to any statute, but under the established practice at common law.

An impression has prevailed to some extent in this State, founded upon several decisions of our late Supreme Court, that the power of review upon a common-law *certiorari* is confined, to use the language of Judge BRONSON, in the case of *The People v. The Judges of Dutchess* (23 Wend., 360), "to questions touching the jurisdiction of the subordinate tribunal, and the regularity of its proceedings." "If," adds that learned

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judge, "they neither exceed their powers, nor depart from the forms prescribed to them by law, their decision upon the merits of the controversy before them is final and conclusive." This has never, I think, been very cordially assented to; and, from my examination of the subject, it seems to me clear that, at least in that class of cases where the writ is used to remove a summary conviction had before a magistrate under a penal statute, the doctrine is erroneous. It is true, as has been often said, that such a *certiorari* removes only the record; and hence it seems to have been inferred that the evidence upon which the conviction was had would not be returned. But it will be found to have been conclusively settled at common law that the magistrate in these cases must insert the evidence in the record of the conviction itself, for the express purpose of enabling the superior court, upon a removal of the proceedings by *certiorari*, to determine upon the face of the conviction whether it was lawful; and although the court would not interfere upon a question as to the mere weight of the evidence, yet a conviction without any evidence to support it has always, in the English courts, been reversed or quashed as erroneous.

I will refer to a few cases to show that this has been the practice of those courts. In the case of *Rex v. Theed* (2 Stra., 919), a conviction by a magistrate under a statute called the "candle act" was quashed, "because the evidence was not set out, it being alleged that the offence was *fully and duly proved*." The report of this case is very short, and does not show how the question was brought before the court; but it was undoubtedly by *certiorari*, as is plainly to be inferred from a previous case against the same defendant upon the same statute (2 Lord Raym., 1375), in which the conviction was sustained.

In a subsequent case, to wit, *Rex v. Lloyd* (2 Stra., 990), in which a *certiorari* was issued to a Court of Quarter Sessions to bring up the proceedings upon a removal of a clerk of the peace from office, a distinction was taken between a conviction and a mere order; and it was conceded, both by the counsel (Mr. Strange) and the court, that, in cases of summary con-

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viction, the record must contain the evidence in order that the superior court may see that the conviction was legal. The chief justice said: "It is fully settled, that, in *convictions*, the evidence must be set out; and, if this was to be considered as a conviction, it therefore would be bad."

In *Rex v. Clarke* (8 Term, 220), the Court of King's Bench expressly held, that, upon a conviction of a person for killing game, without being duly qualified, the magistrates ought to state in the conviction the whole of the evidence for and against the defendant. The object of this requirement, and the extent to which the court will go in reviewing the case upon the merits, is shown by the case of *Rex v. Smith* (8 Term, 588). The defendant had been summarily convicted under a statute of George III against selling bread by wholesale, before it had been baked for twenty-four hours; and this conviction was removed into the King's Bench, no doubt by a common-law *certiorari*, as that was the ordinary if not the only mode of removing such convictions. It was then held, that, where a power of conviction is given by statute to a magistrate, he is the sole judge of the weight of the evidence; but that, if no evidence appear on the conviction to support a material part of the case, the conviction will be quashed.

The same principles were recognized in the case of *The King v. Crisp* (7 East, 389), and *The King v. Chandler* (14 id., 267), in which convictions before justices of the peace — in the one case under the malt act, and in the other for an offence against the excise laws — were removed in like manner to the King's Bench. In each of these cases, the principal question raised and discussed in the latter court was, whether the evidence was sufficient to support the charge.

Many other authorities might be cited; but these are sufficient to show that, upon a common-law *certiorari* for the removal of summary convictions before magistrates, the power of review is not confined to questions affecting either the jurisdiction of the magistrate or the regularity of the proceedings before him, but extends to all other legal questions; and that, unless it appears upon the face of the record that there

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was evidence sufficient to warrant the conviction, it will be quashed.

It follows from what has been said, that the judgment appealed from in this case should be affirmed.

DAVIES, ALLEN, GOULD and SMITH, Js., concurred in this opinion; SUTHERLAND, J., was for affirmance, on the ground that the act is unconstitutional; DENIO, J., dissented.

Judgment affirmed.

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The word "*may*," in section thirty-three of the "act in relation to police and courts in the city of New York" (ch. 508 of 1860), is enabling, and not mandatory.

Whether that section authorizing the infliction of the punishment of grand larceny for the theft from the person of another of less than twenty-five dollars is local within the meaning of article III, section 16 of the Constitution: *Quære*.

Under an indictment charging the larceny of several sums, amounting to more than \$25, the prisoner has a right to have the jury instructed to find whether the sum stolen, it being from the person of another in the city of New York, was more or less than twenty-five dollars.

THE plaintiff in error was convicted, in the Court of General Sessions of the Peace of the city and county of New York, of stealing money. The indictment charged the stealing, from the person of Eliza Denike, of divers bank notes of the different amounts usually issued, and of divers different kinds of gold and silver coins, in such a manner that, if the statement were assumed to be correct, the amount stolen would be several hundred dollars. On the trial, after not guilty pleaded, it was proved that the prisoner stole from the person of the individual named seven dollars while she was in one of the streets of the city. The counsel for the defendant asked the court to charge the jury that they could only find the defendant guilty of petit larceny; but the court refused to give

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such instruction, and the counsel excepted. The court thereupon charged the jury that, if they found that the defendant stole from the person of Eliza Denike the sum of seven dollars, they might render a general verdict of guilty under the indictment; to which the defendant's counsel also excepted.

The provision of the statute relating to larceny from the person, upon which the question arises, is section thirty-three of an act entitled "an act in relation to police and courts in the city of New York," and is as follows: "Whenever any larceny shall be committed in said city and county by stealing, taking and carrying away from the person of another, the offender may be punished as for grand larceny, although the value of the property taken shall be less than twenty-five dollars. Attempts under similar circumstances may be punished as for attempts to commit grand larceny."

The prisoner's counsel requested the court to hold and charge that the section was a violation of the Constitution; and he excepted to the refusal so to charge. There was a general verdict of guilty, and the prisoner was sentenced to imprisonment in a state prison for the term of two years and nine months. The writ of error was brought from a judgment of affirmance rendered in the Supreme Court.

Henry L. Clinton, for the plaintiff in error.

A. Oakley Hall, District Attorney, for the People.

DENIO, J. The counsel for the plaintiff in error maintains that the statutory provision under which this conviction was had is a violation of the clause of the Constitution which declares that "no local or private bill which may be passed by the legislature shall embrace more than one subject, and that shall be embraced in its title." (Art. 3, § 16.) But let us suppose an act which is local in many of its provisions, and yet contains an enactment which is neither local nor private, but which relates to every part of the State, and is essentially public in its motives and objects: Would such an enactment

be void on account of its connection with the local provisions? That precise question came before the court in *The People v. McCann* (16 N. Y., 58). An act, passed in the year 1855, provided that where a conviction should be had in any Court of Oyer and Terminer in the State, for an offence punishable with death or imprisonment for life, the conviction might be reviewed in the Supreme Court and in the Court of Appeals, upon questions of fact, and decided according to the weight of the evidence, and also upon the law, whether any exceptions were taken upon the trial or not. There were other provisions of the act which related to courts in the city, and which were assumed to be local in their character. The court held that the constitutional provision did not apply, and reversed the judgment of affirmance which had been rendered in the Supreme Court, on the ground of an erroneous ruling at the trial, which had not been excepted to. We held, also, that no constitutional objection arose out of the consideration that the provision in question was not referred to in the title of the act. The provisions of the act under direct consideration, which relate to police justices and courts and their clerks, may be considered local; but I am of opinion that the thirty-third section, which provides for an increased punishment for petit larceny, when committed by stealing from the person, in the city of New York, is not local within the meaning of the Constitution. It has, no doubt, features which savor of locality, for it punishes a well-known common-law offence more severely, if committed under peculiar circumstances within the limits of that city, than if committed elsewhere. But it prescribes the rule of conduct for all persons, whether residents of the city or of any other part of the State, and its increased penalties are intended to protect residents of other localities equally with inhabitants of the city; and it was probably intended especially for the security of strangers and sojourners, who are apt to lack the habitual caution of permanent citizens of large towns. Offenders when convicted are to be imprisoned in one of the prisons of the State out of the city, and to be provided for at the expense of the State.

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large; and the disqualification which attaches to a convict under the act affects him wherever he may be in this State. I cannot think that a statute having such consequences is to be classed with special provisions making appropriations for particular roads, public buildings, or the like, situated in particular local divisions. Upon this point, I concur with the views expressed in the opinion given in the Supreme Court.

The plaintiff in error relies upon another point, which is not adverted to in the opinion of the Supreme Court, and seems to have been made for the first time here. It is, that the court charged the jury that they might render a general verdict of guilty; which instruction is alleged to be erroneous, because by it the jury were permitted to find the defendant guilty of stealing all the money described in the indictment, which, being above the value of twenty-five dollars, obliged the court to impose the penalty annexed to the offence of grand larceny, whereas if the verdict had been for stealing to the amount of seven dollars only, though it was from the prosecutrix's person, she might, in the discretion of the court, have been punished by fine and imprisonment only. This is based upon the idea that the word *may*, as used in the section, is not intended to be imperative, but enabling only, thus committing to the court a discretion in such a case to inflict the punishment appropriate to petit larceny, or the higher penalty of imprisonment in a state prison according to its view of the nature and aggravation of the offence. There are many cases in which the sense of a statute requires that this word should be construed like *shall*, and this would be clearly the meaning in this case if it was a newly created offence to which the legislature was affixing the punishment; for then if the prescribed punishment could not be inflicted the offence would not be punished at all, which would be plainly contrary to the intention of the statute. But here the crime of petit larceny which, by the general law of the State is punished by fine and imprisonment in a county jail or both, is made punishable, when committed under a special circumstance of aggravation, by imprisonment in the state prison. There is

nothing *a priori* unreasonable in leaving it to the court to determine in such a case whether the mitigated or the higher punishment shall be visited on the offender. There are examples of confiding such a discretion to the courts, as in the case of cheating by false pretences, and in arson in the fourth degree, and perhaps in some other cases. The primary and most common use of the word *may* certainly is that contended for, namely, the giving permission to perform the act referred to; and where there is nothing requiring it, in the connection of the language, or in the sense and policy of the provision, I do not think we should be warranted in giving the word an unusual or even a secondary meaning.

It is a little difficult to perceive the drift of the prayer for instructions interposed by the defendant's counsel on the trial. In terms, it was that the jury should be charged that under the evidence the defendant could only be convicted of petit larceny. If by this was meant that she could only be convicted of the simple offence of stealing an amount less than twenty-five dollars, it was, of course, inadmissible, as it was proved that the theft was from the person of the owner of the money. But if the object was to obtain a direction that the verdict should indicate the amount stolen under the circumstances charged, or that it was less than twenty-five dollars, so as to exonerate her from the consequence of having stolen an amount which would constitute grand larceny, so that the court would not be compelled to sentence her to the state prison, she was clearly entitled to that direction. I am inclined to think that the latter may have been the meaning of the request to charge. But however this may be, the actual charge given, which was duly excepted to, was, that if the defendant was shown to have stolen from the person of the prosecutrix to the amount of seven dollars they might render a general verdict of guilty. Under this charge a general verdict was given, and, upon the record formed by the indictment and by that verdict, the court could not possibly have given any other judgment than one for imprisonment in a state prison; whereas, if the amount stolen had been truly stated in the verdict, the judgment might,

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notwithstanding the statute, have been that annexed by law to a simple petit larceny. As the judge who tried the issue was also to pronounce the sentence, it is altogether improbable that the error in form, which I suppose to have been committed, has at all prejudiced the defendant. But it is very plain to my mind that an accused person has an absolute right to have such instructions on matters of law given to the jury as will shield him from a verdict for a different and higher offence from that of which he is proved guilty. Hence, I am for reversing the judgment, and awarding a new trial in the Court of General Sessions.

All the judges concurred, except that SUTHERLAND, J., thought the provisions of section 33 local within the meaning of the Constitution, and the court did not pass upon that point.

Judgment reversed and new trial ordered.

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A master is responsible to his servant for injuries received by the latter from defects in the building in which the services are rendered, which the master knew, or ought to have known.

Held, accordingly, that a girl injured by the fall of a privy attached in an insecure and dangerous manner to the factory in which she was employed, may recover damages from the employer.

The case of *Seymour v. Meddow* (71 Eng. L. and Eq., 326), questioned.

APPEAL from the Supreme Court. Action for injuries received from the negligence of the defendant. Upon the trial it appeared that the plaintiff was a girl of fourteen years, employed by the defendant in his mill for knitting shirts, &c. In the wheel-house of the mill, and partly over the water-wheel, was the only privy provided for the use of the female operatives. It was secured by iron spikes or hooks to the east wall of the wheel-house, and was supported by an upright

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wooden scantling, the lower end of which rested on a breast beam in front of the water-wheel. The privy had been in use eight years: the timber composing it, and the lower end of the scantling supporting it, had become somewhat rotten. Six or eight months previous to the injury to the plaintiff, the pinion-wheel, by which motion was communicated to the machinery, and the water-wheel, had worked apart so that their cogs would not mesh properly together. The defendant directed his millwright to put the wheels into closer gear. He attempted to do this in what he testified was the usual and proper manner, but finding some difficulty in doing so, he reported the fact to the defendant, who directed him to do it in another manner. There was evidence tending to show that the effect of making the repairs in the manner directed by the defendant was to make the action of the wheel irregular; to throw a pressure from it upon the east wall; to cause that wall to shake, and to weaken the supports of the privy. The day before the injury of the plaintiff, several of her fellow-operatives observed an unusual vibration in the wall, which was felt in the privy. The plaintiff had occasion to step into the privy, when the structure fell, precipitating her upon the water-wheel, which was in motion, and breaking both her legs. The plaintiff had a verdict of \$1,750. The questions made upon the trial sufficiently appear from the following opinion. The court, at general term in the fourth district, reversed the judgment which had been entered upon the verdict, and granted a new trial; whereupon the plaintiff appealed to this court.

John K. Porter, for the appellant.

William A. Beach, for the respondent.

SMITH, J. The rule governing the liability of the master for injuries sustained by his servant in his employment, and resulting from his negligence, was stated by the learned judge at the Circuit quite favorably to the defendants.

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The judge, upon the request of the defendants' counsel, and in the language suggested by him, at the close of his charge, stated to the jury that the plaintiff "was not entitled to recover unless the jury were satisfied that the defendant knew of the defect or imperfection in the mill in its machinery or appurtenances which produced the injury." The case was thus submitted to them upon the theory that the defendant, Fowler, as proprietor of the factory, was responsible to the plaintiff for the injuries sustained by her only upon the ground that the same resulted from his personal negligence or misfeasance. Certainly no exception can be sustained to this charge on the part of the defendant.

But the court below granted a new trial upon the ground that the defendant's motion for a nonsuit should have been granted, and that the case should not have been submitted to the jury.

The defendant's counsel moved for a nonsuit at the close of the plaintiff's case, and also at the close of the evidence which motions were respectively denied and the defendant's counsel duly excepted. If either application for a nonsuit should have been granted, the error is not cured by the verdict, and a new trial was properly granted. When the plaintiff rested she had proved the essential facts relating to the injuries and facts tending to charge the defendant, Fowler, with actual knowledge of the irregular action of the water-wheel, the effect of the pressure of the wheel upon the east wall, and the probable consequence of the weakening and vibration of the said wall upon the safety of the privy. It was proved that he went at one time into the wheel-pit and personally directed the work there; that he told the millwright to take a bar and pry up the pillar-blocks into gear, and to make some pegs and wedges and put in behind the blocks, between the blocks and the wall. The proof shows that he was personally cognizant of the acts of the millwright, which probably caused the privy to fall. The witness says: "I told Mr. Fowler it was a hard job to force up the block in that way. He said he thought it would do. The wheel was put

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in gear by these wedges driving up the pinion-block." The mode in which the wheel was thus put into gear and made to revolve was clearly improper. Its action was rendered irregular, causing the weakening and shaking of the east wall of the wheel-pit, and the loosening of the foundation and structure of the privy. If this were the consequence of acts directed by, and known to, the defendant—of which the jury were the proper judges—certainly he was responsible for the injuries resulting from such acts upon the ground of his personal negligence or misfeasance. Not that he knew that these acts would, in fact, necessarily render the privy insecure, or would weaken or impair its foundation, but that such might be the consequence. He is chargeable with knowledge of the probable consequence of the acts he directed, or of which he was cognizant.

In this view of the evidence, I do not think the circuit judge would have been warranted in nonsuiting the plaintiff, either at the close of the plaintiff's case or of the defendant's evidence. The case belonged to the jury upon the evidence, tending to charge the defendant with actual, positive misfeasance—of doing or directing negligent acts—careless of, or inconsiderate in respect to, the consequences liable to result therefrom. It is quite clear and well established, that the principal is responsible for injuries resulting to his employees from his personal negligence or misfeasance. (*Keegan v. W. R. R. Co.*, 4 Seld., 175, 181; *Ormond v. Holland*, 96 Eng. Com. Law, 100; *Patterson v. Wallace*, 1 McQueen Scotch Appeal Cases, 748; *S. C.*, 28 Eng. Law and Eq., 48, 51; *Brydon v. Stewart*, 2 McQueen Scotch Appeal Cases, 80; *Marshall v. Stewart*, 33 Eng. Law and Eq., 1.)

It is difficult to conceive upon what ground it can be questioned, that a master is responsible to his servant for injuries resulting from his personal negligence, as much as in other relations of men. I cannot concede or imagine that any person is privileged to do injury to others by his personal negligence or misfeasance. All men alike are liable to respond in damages for such injuries; and the relation of master and servant constitutes no exception to the rule.

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The relation of master and servant involves reciprocal duties and responsibilities. It is the duty of the master, as is well stated by the court in *Noyes v. Smith* (28 Vermont, 59, 64), "to exercise care and prudence, that those in his employment be not exposed to unreasonable risks and dangers; and the servant has a right to understand that the master will exercise that diligence in protecting him from injury, and also in selecting the agent from which it may arise." In *Ormond v. Holland* (*supra*), it was held, that the master would be liable to his servant when the injury resulted from his personal interference with the work of the agent; or in the hiring and retaining of incompetent servants; or in choosing or using of improper implements. In *Patterson v. Wallace* (28 Eng. Com. Law, 50; *supra*), Lord Chancellor CRANWORTH, delivering the opinion of the court in the House of Lords, said: "When a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of the workman. It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure, when in fact the master knows, or *ought to know*, that it is not so."

Within the principle asserted in these cases, the defendant, Fowler, owed it as a duty to the operatives of his factory to provide and keep a safe and secure privy for their resort; or that the privy provided for their use should be safe and secure.

The location of the privy in a dangerous place made it more imperatively his duty to see to it that its foundations were made and kept sound and safe beyond contingency. He had no right to expose the female operatives of his factory to risk and danger in such a place. It was his duty to know that the privy was safe, and that the operatives for whom it was designed and provided might resort to it without personal risk or peril to life or limb.

The injury which the plaintiff suffered was not the result of any accident incident to her employment. The servant doubtless assumes all the risks which pertain to the business in which he is engaged. The learned judge at the Circuit

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correctly charged on this point, that "a person entering the service or employment of another runs all the ordinary risk pertaining to the particular service or employment."

The plaintiff was not called upon to inquire in respect to the safety of the building in question. She could not be expected to know how it was supported, or whether it was or was not safely constructed. It was provided for her use. It was the master's duty to see that it was safe and secure, and not hers to watch and guard by any particular vigilance against accidents of the kind which caused her injury.

We are cited, in opposition to this view, to the case of *Seymour v. Maddox* (71 Eng. C. L., 326). In this case the plaintiff was hired to sing on the stage at the defendant's theatre. In passing from her dressing-room to the stage, she fell through an unguarded and unlighted hole in the floor of the theatre and was injured. It was held that the action would not lie, and that the risk was one assumed in her employment. I cannot think that this case was properly decided, or can be sustained upon any sound principle. The learned judges who gave the opinion of the Court of Common Pleas treat the engagement of the plaintiff as an employment on the premises in their actual condition. Judge ERLE says: "A person makes his own choice whether he will accept employment on premises in this condition; and, if he do accept such employment, he must also make his own choice whether he will pass along the floor in the dark or carry a light." This girl simply contracted to sing in the theatre. She might reasonably expect and assume that the floors of the building were safe, and might be securely passed over. She could not be held, I think, bound to be on her watch or lookout for pit-holes in the floor, and was not called upon, in the course or by the nature of her employment, to guard against accidents from such a cause. I think it was a plain duty which the defendant owed to the plaintiff in that case to provide safe floors in his theatre, over which she might securely pass in the performance of her engagement, and that his omission to do so was gross negligence. But, if this case were good law, I do not think it

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conclusive of the present case. The plaintiff in that case passed through a dark passage in the night without a light. This was her own act, and may have been negligence on her part; and the defendant did not require such omission of care on her part, or impose the risk by any necessity in the ordinary course of duty required of the plaintiff. The fundamental error in this case, I think, consists in its not distinguishing between that class of accidents or injuries incident to the work of the agent and those which arise from extrinsic causes. When a person is employed to do a dangerous job of work or a service of any kind, he assumes all the perils which belong to the work itself; and he must be held to take all the risks which grow out of, or are in any way connected with, or pertain to, the performance of the duties he has assumed to discharge. Against such risks and accidents he may, and he must, take proper precautions for himself, at his peril, and is his own insurer. But this rule does not, and should not, apply to accidents or injuries resulting from extrinsic causes and circumstances which cannot be foreseen by him, and which, by the exercise of ordinary care and caution, he could not anticipate or prevent.

This distinction is well illustrated by the case of *Marshall v. Stewart* (*supra*). In this case the action was brought by the widow and children of a miner killed in the employment of the defendant, from the falling of a stone from the top of the shaft of the mine as he was coming out—the planking then being in an unsafe state. Lord Chancellor CRANWORTH, in delivering the opinion of the House of Lords, said “it was unquestionably the duty of the master—*quo master*—in his capacity of master, to take him up safely, just the same as to have brought him down safely;” and that the injury happened to this man from the neglect of the master while he was sustaining the character of master to him. The injury here, and in the case of *Seymour v. Maddox*, as with the case now before this court, arose from causes extrinsic to the work in which the servant was engaged. It was not the duty of the servant to guard, in the case of *Marshall v. Stewart*, against

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the unsafe planking of the entrance to the mine, or against holes in the floor, in *Seymour v. Maddox*, or, in this case, ⁸⁷ against the insecurity of the privy. The proprietor of the mine, of the theatre, and of the factory, in these cases, provided the place in which the servant was to be employed, and were respectively bound to take proper care not to subject them to unreasonable risks and dangers from causes beyond their control. (28 Vt., 68; *Hilliard on Torts*, 568; 5 Exch., 852; *Perry v. Marsh*, 25 Ala., 659.)

The motions for nonsuit were properly denied, and the judgment of the general term should be reversed, and that of the special term affirmed.

All the judges concurring,

Judgment accordingly.

LATHROP v. SMITH, Administrator, &c.

The relatives of a decedent are entitled to administer upon his estate under the statute (2 R. S., p. 74, § 27), although not entitled to a distributive share when the letters are granted.

Held, accordingly, that, where the father of the decedent, who was entitled to his personal estate, had renounced, the brother was entitled to administration before a creditor.

The Public Administrator v. Peters (1 Bradf., 100), overruled.

APPEAL from the Supreme Court. E. Thomas Lathrop died leaving a father and brother, and the appellant being a creditor of the deceased, applied by petition to the surrogate of Oswego county for letters of administration. The father of the deceased having renounced administration, the surrogate granted letters to the appellant, without the issuing or service of any citation to the brother of the deceased. On appeal, the Supreme Court at general term reversed the decision of the surrogate, holding that the surrogate should have cited the brother of the decedent, before granting letters to the appellant.

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therefore had no authority, under the statute, to grant letters to the appellants, until all such relatives or the guardians of minor relatives, if any, had declined to accept them, and as they had a prior right to the appellant, the proceeding of the surrogate in granting letters to him, without the production of proof, and filing with him a written renunciation of all the persons having such prior right, was clearly irregular and in contravention of the express provision of section 85. For the above reasons, and those so clearly and ably stated in the opinion of the Supreme Court, I am for affirming the judgment appealed from, with costs.

DENIO, SUTHERLAND, GOULD and ALLEN, Js., concurred.

SMITH, J., (dissenting.) Section 27 of article 2, chapter 7, part 2 of the Revised Statutes (p. 74, vol. 2,) provides as follows: "Administration, in cases of intestacy, shall be granted to the relatives of the deceased who would be entitled to succeed to his estate, if they or any of them will accept the same in the following order: First, to the widow; second, to the children; third, to the father; fourth, to the brothers; fifth, to the sisters; sixth, to the grandchildren; seventh, to any other of the next of kin who would be entitled to share in the distribution of the estate." "If none of such persons, or their guardians, will accept the same, then to the creditors of the deceased." The deceased having left no widow or children, his father, who survived him, was his next of kin, and entitled to take the whole of his estate. (2 R. S., p. 97, § 75.)

Neither the appellant's wife, who was a sister of the deceased, nor the respondent, who was his brother, were entitled to any share of the estate. The appellant was appointed administrator as a creditor, upon the refusal of the father to accept the administration. The appellant was properly appointed administrator, unless the respondent, as a brother of the deceased, was entitled to such appointment in the order of priority specified in the statute, in preference to a creditor of the intestate.

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to one or all of a class, necessarily excludes all subsequent classes. They could not have meant that those relatives, and those only, who were entitled to succeed to the personal estate, were competent to take the letters, for, in the first place, the widow, who is first entitled, is not a relative of the deceased, and is not entitled to succeed to the personal estate of the deceased. She is not next of kin, and only takes a portion of his estate under the statute of distributions. She is in law the "best friend" of her husband, and therefore justly preferred in the administration of his estate; second, the words "who would be entitled to succeed to his personal estate" mean only those who, according to the provisions of the statute of distributions, might be entitled to participate in the distribution of the personal estate of the decedent, and this is made clear by the language used in designating those entitled in the seventh place, viz., "to any other of the next of kin who would be entitled to share in the distribution of the estate." The true construction of the statute would therefore seem to be, that all persons who might be entitled to participate in the distribution of the estate, being the widow, relatives, or those representing relatives of the deceased, have the first right to the administration in the order named in the statute. I think this view is greatly strengthened by the subsequent provision of § 27, which declares that "if none of the said relatives or guardians will accept the same," then the letters may be granted to any creditor of the deceased applying therefor. This declaration is emphatic that the letters cannot be given to a creditor unless all of the said relatives or the guardians of such as may be minors enumerated, shall decline to accept the same. The legislature therefore has distinctly said, that until all the relatives or the guardians of such as are minors shall have declined to accept letters, no creditor can be entitled to, or have any claim to take them. In the present case but one relative enumerated, the father, has declined to take out or accept the letters, and it is conceded, that the brothers of the deceased, who were next entitled to them, being those enumerated in the fourth class, have not declined to accept them. The surrogate

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therefore had no authority, under the statute, to grant letters to the appellants, until all such relatives or the guardians of minor relatives, if any, had declined to accept them, and as they had a prior right to the appellant, the proceeding of the surrogate in granting letters to him, without the production of proof, and filing with him a written renunciation of all the persons having such prior right, was clearly irregular and in contravention of the express provision of section 85. For the above reasons, and those so clearly and ably stated in the opinion of the Supreme Court, I am for affirming the judgment appealed from, with costs.

DENIO, SUTHERLAND, GOULD and ALLEN, Js., concurred.

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Neither the appellant's wife, who was a sister of the deceased, nor the respondent, who was his brother, were entitled to any share of the estate. The appellant was appointed administrator as a creditor, upon the refusal of the father to accept the administration. The appellant was properly appointed administrator, unless the respondent, as a brother of the deceased, was entitled to such appointment in the order of priority specified in the statute, in preference to a creditor of the intestate.

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The respondent claims to be entitled to such administration as matter of right, under the statute, and is entitled to such administration over any creditor of the deceased, unless it was essential to such claim that he should be entitled to share in the distribution of the estate.

Applying the rule, that in the construction of statutes, that construction must prevail which gives full effect to every part of the statute, I cannot see how the appellant was entitled to administration as matter of right. He was not, confessedly, at the time of his application for letters to the surrogate, "entitled to succeed to the personal estate" of the deceased. The estate had actually passed to and was vested in his father. He could only receive any share of such estate as heir to his father after his decease, and not as next of kin to his brother. An essential part of the description of the relatives of the deceased, entitled to administration as matter of right, therefore, fails in respect to the appellant. There obviously can be no such thing as a relative entitled to share in the estate of the deceased, unless such right exists at the moment of the death. The right to share in the estate is necessarily fixed at the time of the death. The amount of the estate for distribution depends of course upon the amount of the debts to be first paid; but the question, who is entitled to share in the excess after payment of the debts, is determined by the state of the relations of the kindred to the intestate existing at the time of his decease.

The true construction of this section 27, therefore, I think, requires that the relatives of the deceased therein mentioned should respectively be entitled to share in the distribution of the personal estate of the deceased, at the time of his death, to entitle them, as matter of right, to take out letters of administration upon his estate; and that the fact of an existing present interest in the estate, contingent only in respect to its amount after payment of the debts, must distinctly appear to the surrogate at the time of such application to entitle the applicant, as a matter of right, to such administration. The question for the surrogate to decide is one of interest, on the

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part of the relative in the estate at the time when the application for letters is made to him, and not merely the relation of consanguinity of the applicant to the deceased. This construction, I think, clearly required by the provision in respect to the seventh class in said section as follows: "to any other of the next of kin who would be entitled to share in the distribution of the estate." This implies that the next of kin, in all the preceding classes entitled to administration, must be entitled "*to share in the distribution of the estate*," as a present existing right, at the time when he applies for letters of administration. This view of this section 27 coincides with the construction put upon it in the elementary works. (Willard on Executors, 195; Dayton on Surrogates, 3d ed., p. 235.) And the question is very carefully and ably considered by the late surrogate of New York in *The Public Administrator v. Peters* (1 Bradf., 100), who arrived at the same conclusion. Such construction of the statute conforms also to the law as it stood in this state and in England before the Revised Statutes. Our law, regulating the granting of administration, was copied from 81 Edward III, chap. 11, and 21 Henry VIII, chap. 5. In England, it was repeatedly held that the object of these statutes was to give the management of the property of a deceased person to those who had an interest in the same. In *Withy v. Mangles* (10 Clark & Finnell, 215, in the House of Lords), Lord COTTENHAM said: "It is an established rule of the ecclesiastical courts that the right of administration of the effects of the deceased follows the right of property in them." And this right to administer under this statute was held to belong mainly to the next of kin at the time of the death. See also *Savage v. Blythe* (2 Hagg. App., 150); *Almes v. Almes* (id., 155).

The revisers clearly did not intend, in section 27, to introduce any new rule on this subject, or alter the law. This is negatived by the note accompanying this section when reported to the legislature, which is as follows: "17th section of act concerning executors, &c. (1 R. S., p. 314) — 3d section of act concerning courts of probate (1 R. S., p. 885) — much simpli-

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ded, according to the practice and *the law as now understood*, and many occasions for contest respecting preferences removed." As this section was enacted by the legislature in the precise shape reported by the revisers, with only a simple omission of the word *such*, with which the original section as reported commenced, and which does not at all vary the sense or meaning of the section, it must be presumed that the legislature did not intend to alter the law.

To hold that the law was altered by this revision of the statutes on the subject, would be in conflict with the settled rule, that a change in the phraseology in a revision of a statute should not be construed to alter the law, unless it evidently appears that such was the intention of the legislature. (*Theriat v. Hart*, 2 Hill, 880; 21 Wend., 816.)

This consideration, it seems to me, should be the controlling one in the construction of this statute; as the view it sustains evidently carries out the intent of the legislature, which, when it can be clearly ascertained, should always prevail.

I think, therefore, that the decision of the court below should be reversed, and that of the surrogate affirmed, with costs.

Judgment affirmed.

SCRANTON, Executor, v. THE FARMERS' AND MECHANICS'
BANK OF ROCHESTER.

An executor who was insolvent and indebted to the estate, having sustained a loss by fire, indorsed on his policy of insurance an assignment of it to himself as executor, and, upon receiving payment, deposited the money in a bank to his credit as executor: *Held*, an appropriation of it in payment of his debt.

It is no defence to the bank, against the claim of the estate, that it paid over the money upon the demand of a receiver of the executor's property, appointed in the suit of another creditor.

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APPEAL from the Supreme Court. The plaintiff was one of the executors of T. M. Watson, deceased, and on the 4th day of May, 1858, he deposited in the defendant's bank a sum of about \$350, of which \$72.37, a balance undrawn, is claimed to be recovered in the action. The account in the books of the bank was opened with "Henry Scranton, Executor," and it was entered in this manner by the direction of the plaintiff. At the time of the deposit, the plaintiff was indebted to the estate which he represented in a larger sum than the amount of the deposit. The money deposited was the proceeds of a claim which the plaintiff had in his individual right against an insurance company on account of a loss by fire, of property which the company had insured. The plaintiff had procured a draft from the company's agent for the amount, to be drawn in his favor as executor. He left the draft with the bank for collection, and the deposit was of its proceeds. Shortly before making the deposit the plaintiff, being insolvent, wrote and signed an instrument purporting to assign to himself and his co-executor, Robbins, who did not act, and had never acted, as executor, all his right and title to the above-mentioned policy of insurance, but the paper was not delivered to any one, and it did not appear that it ever came to the knowledge of his co-executor. In June succeeding the time of the deposit, a creditor of the plaintiff obtained judgment against him for a sum exceeding the above balance. After the return of an execution unsatisfied, proceedings supplementary to the execution were instituted, which resulted in the appointment of a receiver of the plaintiff in that action who claimed the balance of the deposit from the bank, and it was paid to him on the 4th day of August following. The plaintiff, before this suit was brought, had demanded of the defendant the money to be paid to him as executor of the estate of Watson.

The referee, before whom the case was tried, decided that the depositing of the money to a special account, in the manner mentioned, was an appropriation of it to the payment of his defalcation as executor, and that was in the nature of a preference which a person indebted, though insolvent, has a right

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to make. Judgment was accordingly rendered in favor of the plaintiff for the above balance and interest. The judgment was affirmed at a general term on appeal, and the defendants appealed here.

William F. Cogswell, for the appellant.

Martin S. Newton, for the respondent.

SUTHERLAND, J. This action was certainly brought by the plaintiff as executor. The plaintiff complains as executor, and I do not see how the defendant can deny that he meant to bring the action as executor.

No objection was taken, either by demurrer or answer, that Robbins was not a party plaintiff, and the defendant could not make the objection at the trial. (Code, §§ 144, 147, 148. *Bidwell v. The Astor Mutual Insurance Company*, 16 N. Y., 266; *Zabriskie v. Smith*, 8 Kern., 836.)

The referee did not decide that the assignment of the policy of insurance by the plaintiff to himself as executor, transferred the money secured thereby to the estate of T. M. Watson; nor do I think it was necessary for him so to decide. The draft was made payable to the plaintiff as executor; was deposited by him with the defendant for collection, and the avails of the draft received by the defendant and placed to the credit of Henry Sorantom, executor. I think these facts show an intention to apply this money on his indebtedness to the estate, and an appropriation of it in part payment of such indebtedness, irrespective of the question whether he could assign the policy to himself as executor. The plaintiff's indebtedness to the estate of Watson is not disputed. He had a right to pay that debt before any other debt; his co-executor Robbins did not act, and had never acted as executor. How could he very well apply the money on his debt to the estate otherwise than as he did? The bank certainly was a very proper place for him to keep the money of the estate in. There was no evidence of a fraudulent intent, unless an intent to prefer his debt to the estate can be called fraudulent.

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But assuming that his purpose was not to apply the money on his debt to the estate, but to cover it up and keep it from his creditors; what right had the defendant to adjudicate the question of fraud, and volunteer to do justice to these creditors? What right had the defendant to pay the money to the receiver? The defendant received the money on deposit in a fiduciary capacity of the plaintiff as executor; and I think it was a breach of the trust upon which it was received to pay it to the receiver as the defendant did. It was not a special deposit, and therefore the relation of bailor and bailee did not exist between the plaintiff and the defendant; but the money was received by the defendant upon a trust like that implied on a bailment. Now it is well settled, as a general rule, that a bailee cannot set up against his bailor a better title in a third party.

But it is said if the goods are taken from the bailee by the authority of law exercised through regular and valid proceedings, it will be a defence to an action by the bailor. (*Bliven v. Hudson River Railroad Company*, 35 Barb., 191; *Burton v. Wilkinson*, 18 Vt., 186.) It is doubtful whether the bailee has a right to yield to regular legal proceedings without defending, or at least notifying the bailor of such proceedings. But however this may be, this principle will not help the defendant. The order appointing the receiver did not authorize him to demand and receive this particular deposit or sum of money, but the property of the plaintiff generally. The defendant undertook to adjudicate, that the money was not the money of the estate of Watson, but of the plaintiff, and paid it to the receiver as the money of the plaintiff, not as the money of the plaintiff as executor, although the defendant had collected it and held it for the plaintiff as executor.

It is plain to me that the judgment of the Supreme Court should be affirmed, with costs.

DAVIES, WRIGHT, GOULD and SMITH, Js., concurred.

DENIO, J. (dissenting.) I do not think this judgment ought to be sustained. The special accounts which dealers are in the

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habit of keeping with banks, by procuring an addition or abbreviation of the word executor, administrator, trustee, attorney or the like, to be attached to their names in the books, are not appropriations of the amount deposited, to the beneficiaries to which the accounts allude, but are simply a method which the dealer adopts for his convenience in determining from time to time to what account the funds which he has in bank belong, as between himself and the estate or the party which he represents in any of the characters referred to. In *Swartwout v. The Mechanics' Bank of New York* (5 Denio, 555), the plaintiff opened an account in the defendant's bank in his own name as collector, he then being United States Collector of Customs of the port of New York. When he went out of office he assigned the balance standing to his credit to J. T.; and the action was brought by him in the name of Swartwout as nominal plaintiff, as the forms of action then required. The defendant set up that it was a deposit bank of the United States, and moreover that the United States were indebted to it for moneys disbursed. It was held that the plaintiff was entitled to recover. The court observed that there was nothing in the case to show that depositing in this bank, in the manner which was done, was by any direction or order of any officer of the government. "This being so," the opinion states, "we must assume that this deposit was like any other one, liable to be drawn by the depositor. The addition of 'collector' in the keeping of the account may have been and probably was to distinguish and keep separate the money he received in his official capacity from that which he received in his own individual capacity. But a deposit in this manner can hardly be deemed a payment over of the money in discharge of his official duty or the execution of his trust. It is placed in deposit, ready to be paid over, upon his own draft, when called upon by the proper officer or authority." This, I think, is substantially the character of the deposit in the present case. It was not the money of the estate which the plaintiff represents that was deposited, if that circumstance would make any difference, nor was it the produce of any assets disposed of

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by the plaintiff in his character of executor, but it was the individual money of the plaintiff. The paper which he made and signed and kept in his own possession was of no legal force. The case, then, was substantially this: the plaintiff had committed a *devastavit*, in appropriating to his own use the assets of the estate, and he was insolvent. He then became entitled to a sum of money in his own right with which, as was quite proper, he desired to indemnify, as far as it would go, the persons who, as creditors, legatees or next of kin, might be entitled to participate in the distribution of the assets. This he might have done by actual payment to these beneficiaries, according to their respective rights and interests; by placing the funds in the hands of his co-executor to be paid out in the course of administration, or by an assignment to a trustee for that purpose. But while the money remained under his own control, the beneficiaries had no more title to it than any other of his creditors. While it remained to the credit of his account in bank, he was entitled to draw it out at any time, subject only to the requirement of using the addition to his name which he had directed to be attached to the heading of the account. No privity was established, by means of the account, between the defendant's bank and the creditors or legatees. There is no evidence that the defendants knew who they were, or indeed that they were informed of whose estate the plaintiff was the executor. A moment's reflection will show the error of considering the bank as the trustee of the parties interested in the estate. If it was such trustee, it was obliged to hold the funds for the benefit of, and to pay them out to, the parties justly entitled to them. This would involve the taking of an account of the administration of the estate, a duty which the law has entrusted to the surrogate or the other courts, and which usually involves a good deal of detail. Again, if the bank is to be considered the trustee of the beneficiaries, it would be liable if it paid out the funds to the plaintiff (who might misappropriate them as he had done the original assets), or to any person upon his check. It is scarcely necessary to say that banks do not

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charge themselves with these duties, or incur these obligations by suffering an executor or other trustee to become a depositing dealer with them, even though he indicates in the title of the account that he considers his deposits as trust moneys. It is still more unreasonable to say that such a deposit is an accounting *pro tanto* by the executor, or a payment in discharge of himself. The beneficiaries are not parties to the transaction, and the deposit does not create legal relations of any kind between them and the bank.

It follows from what has been said that these funds, or the debt which their deposit with the defendant created, remained the property of the plaintiff like any other money or choses in action which he might possess. They were subject to the legal diligence of his creditors. The parties to whom they were eventually paid, were the first to avail themselves of the legal instrumentalities which the law has provided for the collection of debts, and the receiver appointed in their suit having presented himself to the bank and demanded the payment of the money, it was in my opinion the duty of the defendants to yield to that claim as they have done.

I am therefore in favor of reversing the judgment of the Supreme Court and ordering a new trial.

ALLEN, J., also dissented.

Judgment affirmed.

34	430
116	539
34	430
137	426

WILDS, Administratrix, &c., v. THE HUDSON RIVER RAILROAD COMPANY.

A party claiming to have been injured by the negligence of another must fail in his action, unless it appear that he was free from any negligence without which the injury would not have happened. The greatest negligence on the part of the defendant will not cure the defect of the least negligence contributing to the injury on the plaintiff's part. Cases of negligence form no exception to the rule that it is the judge's duty to nonsuit where a verdict for the plaintiff would be clearly against the weight of evidence.

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One driving in a highway across a railroad is guilty of negligence fatal to an action, if he does so without looking for a train which he would have seen, or listening for signals of its approach which he would have heard, in time to have avoided a collision.

It is also such negligence in one knowing the position of the railroad and the frequent passage of trains, to approach the crossing at such speed as to be unable to stop his horses before actually getting upon the track. It is error to refuse so to charge without the qualification that the defendant must have used proper precautions to notify travelers of the approach of a train.

ACTION under the statute for causing the death of the plaintiff's intestate by the negligence of the defendant in running a train of cars in the city of Troy. It appeared, upon the trial at the Rensselaer Circuit, that Wilds, the deceased, was a farmer residing about twelve miles from Troy. He received the injury from which he died while crossing the defendant's road, which has two tracks, at its intersection with Fourth street. Both parties gave evidence tending to show negligence in the other. The evidence and the questions arising upon the trial are sufficiently stated in the following opinion. The plaintiff had a verdict and judgment, and the defendant appealed to this court.

John H. Reynolds, for the appellant.

William A. Beach, for the respondent.

GOULD, J. This case comes before us on two appeals. One from an order of the general term of the Supreme Court, affirming an order of the special term which denied the defendant's motion for a new trial, made on the minutes of the judge who tried the cause; that appeal bringing the case up as if on a case made. The other appeal is from the judgment of the Supreme Court, affirming the judgment rendered at the Circuit on a verdict; this appeal bringing before us the exceptions taken by the defendant to different parts of the charge to the jury, and also the exceptions taken to the denial of the defendant's two motions for a nonsuit; one made at the close of the plaintiff's testimony; the other made at the close of all the testimony.

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The right to recover damages for this class of injuries to the person (whether asserted by the party injured, or by his representatives under the statute), depends upon two concurring facts: 1st. The party claimed to have done the injury must be chargeable with some degree of negligence, if a natural person; if a corporation, with some degree of negligence on the part of its agents or servants; 2dly. The party injured must have been entirely free from any degree of negligence which contributed to the injury; i. e., of any negligence without which the injury would not have happened.

These essential elements of such a cause of action are as absolutely distinct from, and independent of, each other, as are the two opposing parties; and each and both must be, by itself, in the case, upon the evidence, or there can be no recovery. The question presented to the court, or the jury, is never one of comparative negligence, as between the parties; nor does very great negligence, on the part of a defendant, so operate to strike a balance of negligence as to give a judgment to a plaintiff whose own negligence contributed in any degree to the injury.

It is true, that some of the reported cases of this kind of action use, in a very uncertain manner, the terms "gross negligence," "ordinary negligence," "ordinary" or "common prudence," and similar terms. But however applicable such terms may be to the cases of bailment of property, and between the different well-known classes of such bailors and bailees, it is difficult to see how they have strictly and legally any application to cases like the one under consideration. - No element of fraud (or *quasi* fraud), or willfulness, enters into the cause of action. (*Wells v. N. Y. C. R. R. Co.*, decided last term.) The law says to the defendant, if you have by simple negligence caused this injury, so far as you are concerned the ground of action is complete. At the same time it says to the plaintiff, although, so far as the defendant's acts are concerned, the case is made out, you cannot prevail, if you have, by your simple negligence, helped to bring about the injury.

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Another preliminary point (to be passed upon generally, before we can decide as to its being applicable to this case), is the claim that the question of negligence belongs peculiarly to the jury; and that cases involving that question should never be taken from them to be decided by the court. To this position it should be answered, that there is no case known to the law (even the question of fraud, in certain cases where the statute says it is to be submitted to the jury), in which an appellate court has not and does not on proper occasions exercise the power of setting aside the verdict of a jury, not merely when it is entirely against evidence, but when it is clearly against the weight of evidence. And no court can be guilty of the absurdity of holding that, in such a case, it would not have been competent for the judge, who tried the cause, either to nonsuit the plaintiff or direct a verdict in his favor, as the case might have required. No legal principle compels him to allow a jury to render a merely idle verdict.

The full extent of this position has been held by this court (*Johnson v. Hudson River R. R. Co.*, 20 N. Y., 73), in saying that, "to carry a case to the jury, the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned *solely* by the negligence of the defendant." Can this be true without holding that, in every case where a verdict would be set aside as against the clear weight of evidence, the court should take the decision of the case from the jury? Certainly, it is not easy to conceive any other definite position which would be consistent with the decisions. (18 N. Y., 422.)

Nor is the applicability of the rule varied by saying that the evidence may consist of circumstances, from which inferences are to be drawn as to negligence; and that, as different minds may draw different inferences from the same circumstances, the jury must always be the judges of negligence where the evidence is circumstantial. No one ever supposed that the right of a tribunal of review to reverse a verdict as against the weight of evidence was confined to cases of direct, positive testimony. The right covers all cases, by whatever

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kind of legal evidence any of them are sought to be proved; and it proceeds according to the weight of the evidence, whether circumstantial or not. If the circumstances are such that from them can be drawn two opposing inferences, either one equally consistent with the proof, it is no argument against the rule; but the case is one where there is not a clear preponderance of evidence either way, and the rule is simply inapplicable. Still, in precisely such a case (*Cotton v. Wood*, 98 Eng. Com. Law, 566), it has been explicitly held that the court should nonsuit, because negligence on the part of a defendant (as care on the part of a plaintiff, in another case, cited *post*.) must be made to appear by the evidence. This case says, "the judge will not be justified in *leaving the case to the jury*, where the plaintiff's evidence is *equally consistent* with the absence, as with the existence, of negligence in the defendant." But there are many cases in which care, or the want of it, is unmistakably apparent on the face of the circumstances. To walk within six inches of the curbstone of a sidewalk is not careless; but to walk as near the edge of a precipice is the act of a madman. Upon both points—the rule as to negligence on the part of the person injured, and that as to the duty (as well as the right) of a court to pass upon the question, and nonsuit—there are three strong cases: One in 91 Eng. Com. Law, one in 29 Conn., and one in 1 Allen (Mass.), 187. The Connecticut case (pp. 208, 209,) says that the rule, that the party injured must have acted with ordinary prudence, is a stern, unbending rule, which has been settled by a long series of adjudged cases, and must be considered as settled law. And the decision set aside a verdict, as against the evidence as applied to this rule; and that was a case where it was conceded that the defendant was negligent. The case in 91 Eng. Com. Law (pp. 148, 149,) affirmed a nonsuit because (though there was some evidence that defendant's servant was negligent) there was not evidence enough to take the case to the jury. While the case in 1 Allen (pp. 187-190) lays down, as the undoubted law (of Massachusetts), that the plaintiff must show "by *affirmative proof*

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that *he was in the exercise of due care;*" and for failure of such proof, the court should, as it did, nonsuit.

Let us examine this case upon the principles of all but the last case (not passing upon that). What proof is there of want of care on the part of the defendant? So far as the plaintiff's witnesses are concerned, one man, a tin peddler, who stood by his tin wagon, some five rods from the track, talking to a woman to whom he was trying to sell his tin ware, says he first heard the whistle a very short time before Wilds was struck by the engine, or almost at that instant; and that he heard the bell of the engine before the engine was in sight; that Wilds drove on to the track as the train was coming, and was nearly across it when he was hit; that the train was coming fast for that part of the track, where it does not generally go fast. He is the plaintiff's only witness who saw the occurrence; and he says he did not see a flagman there. The point of collision was at the crossing of the railroad track and Fourth street, in the lower part of the city of Troy; and the time, noonday. Carroll (a passenger on the train), called for the plaintiff, says he can't tell how fast the cars were then moving; they were running very rapidly, he thinks. Eddy testifies as to the measurement of distances only; chiefly as to how far up the track a person could see from Fourth street, below the track; and says, a man sitting in a wagon 25 feet south of the south track, in the centre of Fourth street, could see the cars at a distance of 650 feet. Gifford testifies that, from the point of collision to the point where the train was stopped after the collision, was about 400 feet. This is all the plaintiff's evidence on the subject. No proof was offered to show any rate of speed; or whether "fast for that part of the track," or (what the witness thought) "very rapidly," was six miles an hour, or any other rate; and no evidence was offered to show within what distance a train could be stopped when going at any specified rate of speed. This evidence proves these facts: that the defendant complied with the statute, by giving the warning of the bell, so that it was heard by the plaintiff's only witness at a distance sufficient, and in time

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sufficient, to give abundant notice to all persons to keep off the track; that at the time of such warning, and as the train was approaching the crossing, Wilds was not (nor was any one), upon the track, for the engineer to see him and check his train; and that the engine ran against an object which was put upon the track suddenly (on a trot), and when the engineer had no reason to anticipate or try to avoid hitting it. It would seem difficult to say that here was any proof of any negligence of the defendant. And negligence, like any other ground of action, is to be proved.

Add to this the defendant's evidence. Orr testifies that he heard the whistle before the flagman went to his position; and of course, from the whole evidence, this was the long warning whistle (as a signal of an approaching train), not the short sharp whistle for stopping, which was but the instant before collision. Maria Banker heard the whistle and bell before Wilds came up to the track. These two witnesses had no connection with the railroad company. Again, the flagman, heard both whistle and bell before he went from his flag-house to the flagman's station upon the crossing. Young, the conductor, testifies to the sounding of the long warning whistle as far off as the bridge above the hospital. Gregory, the engineer, says the whistle was sounded above the hospital, and the bell was ringing all the time from the depot to the crossing in question (half a mile). Porter, the fireman, says he rang the bell all the way down, and the whistle was sounded above the hospital. Van Hoesen, the brakeman, says the whistle was sounded and the bell rung through the cut (which terminates at the hospital). Roarke, baggage-master, says the long whistle was blown long before they got to the place of collision. Thus eight witnesses, not in any way discredited (by cross-examination or otherwise), two of whom had no bias for the defendant, establish affirmatively that the company did give the proper warning of approach; and as to that point, it is beyond controversy that there was no negligence on the part of the defendant.

As to speed: Young thinks it about five miles an hour; Gregory says it was about five or six miles an hour; Porter says

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about six miles an hour, as estimated to the best of his knowledge; Roarke says about six or seven miles an hour. It is proved that the rails were slippery from a recent rain, which rendered stopping quickly difficult. But there is no proof as to the distance required for stopping a train, at any rate of speed. And even if the rate of speed might have something to do with the question of defendant's want of care, there is no shadow of proof that it did.

The only other point on which the plaintiff's case made even a suggestion of negligence on the part of the defendant is, that the one witness, Gillespie (the tin peddler), says, "there was no flagman there that he could see." On this point, he is unquestionably in error. Porter, Orr, Maria Banker, O'Brien, Agan (the flagman), Ware, six witnesses, four of whom were unconnected with the company, testify not merely to the flagman's being there, but to his making abundant signals of an approaching train, and being nearly run over, actually hit, by the team of Wilds. Due care in this respect is abundantly, overwhelmingly proved. Nor is it at all material to this point of due care whether the flagman, being on the track and waving his flag as a signal, was devoting his particular attention to keeping back Wilds, or to keeping a woman and child out of danger. He was there, making signals plainly visible to all; and that he could not attend to two, at once, when both were bent on running into danger, was not his fault, or that of the company. The men upon the engine tried to stop, as soon as they saw any reason for stopping. Seeing the flagman in his place, to keep persons off the track, and there being no one on the track, they had no reason to suppose that any one would disregard all the usual warnings, and get on the track, directly under the engine. As soon as Wilds did this, they saw him, and attempted all possible means to avoid the collision; but it was then inevitable.

The entire evidence fails utterly to show any degree of negligence on the part of the company; and the second motion for a nonsuit should have been granted.

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On the other hand how stands the proof of carelessness on the part of the deceased? The plaintiff's chief witness, the only one who saw the occurrence, says, "when I first heard the whistle he was getting right on to the south railroad track with his horses. If he had stopped then, he would not have been hit: he could not stop very easily." He did whip his horses, and went across this south track, and nearly across the north track, when on that track his wagon was struck.

The defendant's witnesses show a very strong case of carelessness, if not one of utter recklessness, on Wilds' part. Orr testifies to the flagman's being in the middle of the street, between the two tracks, waving his flag both ways, and that teams were checked by that and waited; that O'Brien attempted to stop Wilds by throwing up his hands and shouting at him; and that, failing to stop him by these means, O'Brien stepped into the street and tried to catch the horses. Wilds drew up the reins, whipped up the horses, and went across the track, when the engine struck him. That Wilds' horses in crossing struck the flagman and turned him around two or three paces. That when O'Brien shouted to him, the horses were fifteen feet from the south track, and coming upon a smart trot. Maria Banker says that, having heard the whistle and bell, she looked out of her window (which commanded a clear view of the spot), and saw this man approaching on a fast trot. She halloosed to him to stop; he looked around; she halloosed to him again; he whipped his horses; the flagman held his flag before the horses; the flagman was hit by the horses and went down. When she halloosed, the horses had not got on to the south track. O'Brien says the flagman was in his position swinging his flag, and that, seeing Wilds coming upon a trot, and knowing him, he started towards him to keep him back, holding up his hands to him for that purpose; and finally he tried to grasp the horses. The horses passed him, went on the track, hit the flagman in the back, went on in front of the engine, and the collision occurred. Again, the flagman, says he was in his proper place, waving his flag; that his immediate attention was taken by a woman with a child in her

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arms, whom he was keeping off the track, when Wilds' team struck him, as he was standing on the south track, and he barely escaped with his life. Ware was further off; he saw the flagman there, and says he was trying to keep Wilds back, and that Wilds kept pushing up and hit the flagman. He says the flagman was facing Wilds; an error not very remarkable in the confusion, and not important, since he confirms the facts that the flagman was there, and was struck by the team. It is further in evidence that the railroad had been in operation there for some eighteen months; and that Wilds was well acquainted with the city; came to it every Saturday to supply his customers with the produce of his farm (which was some twelve miles out), and that on this day he had gone to South Troy, across this very track, to a customer's house: so that he knew the railroad was there, and all about the crossing. Is it possible, from all this body of direct evidence, to draw two inferences? Can there be a doubt that Wilds knew the train was coming, and preferred to take his chance of speed insuring his safety? Or if there can be any doubt of this, is it not inevitably certain that all the appliances of caution proved to have been used must have made him aware that there was something unusual at that point, calling on him for at least sufficient attention to look about him, and find out what it was; so far, at any rate, as not to run over a man, who, for some purpose and with a signal flag, was standing in the street and directly in his way? If his horses were at all troublesome to manage (though there is no proof that they were, until they were actually on the south track and near to the engine, before which he had notice enough to pause), there were men enough on the spot, ready and able to assist him in holding them, and one man tried to hold them back, not being called on. If Wilds was careful, it would be difficult to imagine a case of want of care.

The case is much stronger than that of *Stevens v. The Oswego and Syracuse Railroad Company* (18 N. Y., 422-427), in which this court sustained a nonsuit; and that case remains the law of the State.

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It is quite usual, in similar suits, to find counsel, and sometimes judges, disposed to dwell upon the alarming power of a locomotive, and the appalling danger of running one anywhere but in a wilderness; and great stress is laid on the strict and untiring watchfulness and care that are required of those who use so dangerous a thing. All this is very true. But there are two sides to these facts. If a locomotive be eminently dangerous, everybody knows it to be so. And it is as dangerous to run against, or under it, as to have it run over you. A railroad crossing is known to be a dangerous place, and the man who, knowing it to be a railroad crossing, approaches it, is careless unless he approaches it as if it were dangerous. To him, the danger is vastly greater than it is to the locomotive: he may lose his life. And if the Company be bound to use very great care not to endanger him, why is not he bound to use equally great care not to be endangered? His care should be as much graduated by the danger as the Company's. When every one, who knows that the railroad is there, is bound to know and to remember that a train may be approaching, not to take the very simple precaution of looking and listening, to find out whether one is coming, cannot but be want of care. To be sure, the statute requires a railroad company to give specified warnings; but it neither takes away a man's senses, nor excuses him from using them. (18 N. Y., 425, 426.) The danger may be there: the precaution is simple. To stop, to pause, is certainly safe. His time to do so is before he puts himself in "the very road of casualty." And if he fails to do so, it is of no consequence, in the eye of the law, whether he merely misjudges or is obstinately reckless. His act is not careful; and he is to abide the consequences, not the Company under or into whose train he saw fit to run, whether he did so in inexcusable ignorance or in the belief that he could run the gauntlet unharmed. Nor is the court to look about to find how he, after putting himself there, conducted; whether he then took the best means of escape, or in his confusion ran more hopelessly into the jaws of death. No degree of presence of mind, and no want of presence of mind, at that time, has

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anything to do with the case. He should not be there, by want of care.

Much weight is given to the fact that the place of such collisions is a highway, and that the traveler has a right to be there with his vehicle. Certainly it is a highway, or he would have no right to be there at all, and he could not recover, no matter what might be the negligence of the Company. Further, it is a part of a railroad track, and the train has a right to pass there. It is a place in which two easements have a common right; and it is the right of the public that both shall be so enjoyed as not unnecessarily to interfere with or abridge the rights of either.

A sound and reasonable view of cases of this description is of as much importance to the public as it is to railroad companies. Such corporations are to be treated precisely as any other party to a suit. No more stringent rule is to be applied to them than is applied to individuals; nor is any less stringent one. Every citizen of the State has a deep interest in the existence and the successful operations of such companies. The facilities of travel which they afford, the means they give of accumulating and of diffusing the products of our wide land and of our vast commerce, have already produced the mightiest results in the development and the unparalleled increase of the resources of the nation. They have clothed us with the richest garments of peace; and they have multiplied our armies and wielded our weapons of war. To do this, they have needed those powerful means the use of which is necessarily accompanied with danger. But, as the public has the benefit of those means, it is bound to incur its own share of that danger. A mutual duty is enjoined, and a mutual liability results from a failure to perform that duty; and a party who fails in performing his own part thereof, is in no condition to enforce the penalty of a breach on the other party.

Having considered the points embraced in the appeal from the order denying a new trial on the merits, we come to the exceptions contained in the appeal from the judgment.

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The first exception to the charge of the judge is thus taken: Defendant requested the court to charge "that, if the negligence of the deceased in any manner contributed to cause the collision which resulted in his death, the plaintiff cannot recover." The request was so far complied with as to give the charge in the terms asked, qualifying it with the words, "it being understood that this negligence is the want of such care as a person of ordinary prudence would exercise in like circumstances." The defendant asked for his single, definite, legal proposition; and excepted to having it accompanied by any addition to give it uncertainty, or tending to confuse the minds of the jury. And, if his request contained a legal proposition, which, unqualified, was sound and applicable to the case, he had a right to have it announced to the jury, if not in the very terms asked, at least substantially so, and not so qualified as to alter the principle or to add to it in any way to render it uncertain or tending to confuse the jury; or, he should have it refused, either directly, or on the ground that the charge already given has properly covered the law of the case. And while a juryman might suppose that he knew what, in the circumstances proved, constituted "negligence," he might be puzzled with so utterly indefinite a qualification, especially as, in a prior part of the charge, the jury had been told to consider, in estimating what would be negligent in Wilde's approach to the crossing, "whether he understood the signals;" thus putting on the Company the obligation, not merely of making the signals, but of furnishing understanding to the other party.

The defendant's request certainly gave, in precise words, the true legal rule of the case; and he was entitled to have it given to the jury substantially as he asked it without qualification, or to have it plainly refused. The defendant's next request to charge was, "that if the deceased approached the crossing, knowing the position of the railroad, and that trains were frequently run thereon, at such a rate of speed that he was unable to stop his horses before actually getting upon the track, and that speed contributed to cause the collision, the

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plaintiff cannot recover." This, inasmuch as the charge had already, as against the defendant, included the element of speed as constituting negligence, and had said "the speed should be regulated with reference to the apparent danger;" this would seem an entirely proper request, that each party might be held to looking out for the apparent danger. It was refused, except with the qualification that the defendant must have "used all proper precautions to notify travelers of the approach of the trains" (with other qualifications as to "ordinary prudence"). Which is equivalent to saying that the want of care of Wilds depended upon the exercise of care by the Company; and that he might approach a dangerous place with utter recklessness unless the Company used all care; while the Company must approach the same place with "all proper precautions," or be liable, not merely for its own want of care, but for that of all comers. This is too unequal to be sound. Each one's care, or want of care, exists in his own act, without the slightest reference to care, or the want of it, in the other party. Each is governed by his own independent volition, with which the other can by no possibility have any connection; and on the exercise of that volition by each, and on that only, depends the act which is either careful or not.

A further request to charge on the part of the defendant contained the proposition "that if the deceased was aware of the approach of the train, in time to have stopped before reaching the track upon which the train was approaching, and intentionally drove upon the track, after being aware of the train, the plaintiff cannot recover." The court refused to charge in this form. The request covers this ground, that, if the deceased, knowing that a train was approaching in season to take his own course, and decide whether to be safe, and stop, or to go on and run his chance, chose to go on, he must abide the risk that he took. It is rather difficult to see why this is not the law. Certainly no legal rule is consistent with qualifying the position by leaving it with the jury to speculate on the idea whether he "would have stopped in the exercise of reasonable care, &c., and could not reasonably expect to

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pass in safety, and intentionally drove upon the track," &c. This limits the negligence on his part to a grade little short of suicide.

Another of the defendant's requests to charge claimed that "the deceased cannot, by his own negligence, cast upon the defendant the necessity of exercising extraordinary care." The court added after the word "negligence," "*as above defined and contributing to the injury.*" The request seems to state an accurately correct legal proposition; and the defendant was entitled to have it given to the jury as hereinbefore stated.

The judgment of the Supreme Court and its order should be reversed; and a new trial granted, costs to abide the event.

DAVIES and SMITH, Js., concurred; DENIO and ALLEN, Js., were also for reversal, the latter on the ground of the plaintiff's negligence. All of them agreed in respect to the right and duty of a judge to nonsuit in cases of this character.

SUTHERLAND, J., (dissenting). The question is, whether the whole case at the close of the testimony was not a case for the jury; whether the question of negligence on the part of the intestate, as well as the question of negligence on the part of the employees of the defendant, were not both questions for the jury, to be passed upon by them as questions of conduct or misconduct, under all the circumstances of the case.

In my opinion, the acutest human intellect will glance off with every attempt to make either of these questions, questions of law.

It may be conceded, that there was no contradictory evidence as to the conduct of the intestate, in approaching the crossing; yet, whether such conduct was negligent or not, was a question for the jury, under all the circumstances of the case. The circumstances of a particular case may be conceded, and yet, as evidence or arguments on the question of negligence, they may be, and generally are, conflicting; that is, some of the conceded circumstances may, and generally do, tend to show negligence, and some, care and attention. Negligence is a conclusion or judgment as to conduct, arrived at

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by weighing or comparing these circumstances or arguments. I have always understood that the common law had made it the province of the jury, when the trial was by jury, to pass upon these circumstances and draw the conclusion.

Sir William Jones, at the conclusion of his work on Bailments, states this as a corollary from the principles therein laid down. At an early day, the books and judges undertook to define, as between bailor and bailee, gross, ordinary and slight negligence. It must be conceded, if gross, ordinary and slight negligence, as between bailor and bailee, had been defined by the law, so as to be practicable, then, whether the conceded circumstances of a particular case constituted or showed gross, ordinary or slight negligence, would be a question of law; but even as between bailor and bailee, on a conceded state of facts, the question of gross negligence has been held to be a question for the jury. (*Dorrman v. Jenkins*, 2 Adol. & Ellis, 256; *Nelson v. Macintosh*, 1 Starkie, 287.) In *Patterson v. Wallace*, in the House of Lords, 1858 (28 Eng. Law and Eq., 48; S. C., 1 McQueen, 748), there was no controversy about the facts, but only whether a certain result was to be attributed to negligence on one side or to rashness on the other. The judge having withdrawn the case from the jury in the court below, it was held in the House of Lords to be a pure question of fact for the jury; and the judgment below was reversed. At the conclusion of his opinion, Lord Chancellor CRANWORTH says: "With all deference to the learned judges, it appears to me that they have misunderstood the province of a judge at a trial of this sort." See, also, *Fraser v. Hill* (1 McQueen, 397), to show that it is the province of a jury to draw the presumption of a fact from circumstances; also, Chancellor JONES' opinion, in *Jackson v. Seward* (8 Cow., 409, &c.; 1 Greenl. Ev., §§ 44, 48.)

In *Bernhardt v. Rens. & Sar. R. R. Co.* (32 Barb., 169), the question arose on a motion to nonsuit. Judge INGRAHAM, in his opinion, says: "It will not be denied that negligence is, in all instances, a question of fact." This case was affirmed in this court, but has not been reported. Judge SELDEN says,

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in his opinion in the case in this court: "It is not easy to suppose a case in which the court would be warranted in holding, as matter of law, that negligence was proved."

. A question of negligence presents the question, what a person ought or ought not to have done under the circumstances of the case. The law has not undertaken, except in certain instances, to define, and could not very well define, this duty under particular circumstances; for it could not anticipate and define the circumstances under which the duty arises. A question of negligence is a question belonging to the common affairs and experience of men; it is a question to be decided under the circumstances of the case, by the common experience of men as to the duties of each other. Its decision is really the expression of an opinion or judgment as to the conduct of another under particular circumstances; and, as has been observed, it is very rarely, even where there is no controversy about the circumstances, that they are not conflicting, as evidence or arguments on the question of negligence; for some will tend to show care, and some negligence.

This being the nature of a question of negligence, is it extraordinary that the common law should have committed the decision of it to a jury?

If, as was intimated by Judge BARCULO, in *Haring v. New York & Erie R. R. Co.* (18 Barb., 9), juries cannot be safely trusted with this question, as between an individual and a railroad corporation, then, in such cases, let the legislature alter the common law, and, in such cases, commit it to the court.

It is very clear to me that, in this case, the questions as to negligence on the part of the intestate, as well as to negligence on the part of the defendant's employees, were questions of fact for the jury; and that the court very properly refused to hold otherwise.

My conclusion is, that the judgment of the Supreme Court should be affirmed, with costs.

SELDEN, Ch. J., and WRIGHT, J., were absent.

Judgment reversed and new trial ordered.

Daniels v. The Atlantic Mutual Insurance Company.

**DANIELS *et al.*, Executors, &c., v. THE ATLANTIC MUTUAL
INSURANCE COMPANY.**

The owner of a ship, having chartered her for a voyage, effected insurance upon the freight, earned or not earned. The ship was wrecked near her port of discharge, and the insured abandoned the freight to the underwriter. The seamen saved from the rigging, &c., enough to pay their wages, and also part of the cargo, on which the freight was enough to pay their wages: *Held*,

1. That the seamen were entitled to wages for the voyage, and not merely from the time of the casualty. They take their pay as wages, and not as salvage.
2. The wages, upon the abandonment, became a charge upon the ship and owner, in exoneration of the freight.

APPEAL from the Superior Court of the city of New York. The defendant, by its policy, dated 17th December, 1857, insured George Daniels to the amount of \$15,000 on freight, valued at \$25,000, earned or not earned, in the ship *Flying Dutchman*, at and from San Francisco to New York. The vessel was under charter to Moore & Folger for the voyage, at \$10,000, payable on arrival at the port of discharge. The master was to sign bills of lading for the cargo at any required rate of freight, without prejudice to the charter. The ship sailed from San Francisco on the 1st day of November, 1857, with a cargo, the freight upon which, according to the bills of lading, amounted to \$14,591.78, and was wrecked on the New Jersey coast in the course of the voyage on the 14th day of February, 1858. The assured abandoned the freight to the defendant on the 16th day of February, 1858; and the abandonment was renewed and confirmed upon the receipt of further intelligence from the vessel on the 24th day of February, 1858, and was accepted by the defendant, who paid to the assured, on account of the loss, \$12,500, leaving unpaid the sum of \$2,500; for which sum, reduced by freight saved by the insured over and above seamen's wages to \$2,877.29, this action was brought. The crew remained by the wreck, and aided in saving the property so long as there was anything

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for them to do, and were then discharged. Portions of the cargo were saved and brought into port, the value of which was \$11,727.72; and the freight upon which was \$4,276.17, over and above the salvage charges and expenses. Parts of the vessel were also saved, and produced on a sale thereof the net sum of \$3,169.63. The seamen's wages for the voyage were \$2,397.91. Daniels, the assured, collected the freight, and the proceeds of the remnants of the vessel, acting for whom it might concern. The freight collected was apportioned between the defendant, representing the ship-owner and the charterers, in the proportion of \$10,000 to \$14,591.78, which gave \$2,930.53 to the ship-owner. Out of this sum, the ship-owner paid the seamen's wages, leaving \$582.14 as the net freight, which was credited to the defendant on account of the loss. The application of the freight earned, or any part of it, to the payment of seamen's wages for the voyage was resisted by the defendant, who claimed to be entitled to the whole freight as abandoned. The action was tried in the Superior Court of the city of New York before WHITE, J., and a jury; and a verdict was directed for the whole amount claimed by the plaintiffs, on the ground that, under the abandonment, the defendants took the freight subject to the lien thereon for seamen's wages, if freight should be earned to the amount of such wages, or to such amount as should be saved less than such wages. Exceptions were taken by the defendant to the rulings of the judge upon the trial; and upon the argument thereof, at the general term of the court, a new trial was granted. From the order granting such new trial the plaintiffs appealed to this court, stipulating that, if such order should be affirmed, judgment absolute should be given against them.

Edward H. Owen, for the appellants.

Daniel Lord, for the respondent.

ALLEN, J. The general rule of the maritime law is that seamen are not entitled to wages, unless freight is earned in

the voyage; and this, whether the hiring is for the voyage or by the month. If the loss of the voyage and freight is attributable to the act or default of the master or owners, the general rule will not apply. The right to wages is made to depend upon the completion of the voyage, in order to secure the fidelity and stimulate the zeal and attention of the mariners. It is also said, that public interests require that the fate of the seaman should be connected with that of the vessel. (Abbott on Ship, Story & Perkins' ed., 638; *Van Beuren v. Nelson*, 9 Cow., 158; 1 Pet. Ad., 194.) If the vessel be lost, although some part of the cargo be taken out of her by the seamen and saved, still no wages will be earned by the crew, for the reason that, the ship not being saved, no freight is earned. Perhaps, in such case, the mariner could recover an equitable compensation in the nature of salvage. (*Dunnett v. Tomhagen*, 3 Johns., 154.) Hence, freight is said to be the mother of wages, and the safety of the ship the mother of freight: a maxim expressing the connection in law between the earning of freight by the vessel and the right of the mariner to recover wages from any source. If the seaman becomes entitled to wages, he is not confined to the freight, nor is that declared to be the primary fund for their payment. It is said to be the most natural fund out of which the wages are contemplated to be paid; and it is relied upon by the master as the fund from which to discharge his personal responsibility for disbursements and wages. (*Sheppard v. Taylor*, 5 Pet., 676.) The same may be said of the earnings of a factory, or the products of a farm. They are the most natural fund for the payment of the operatives and laborers. The 13th rule in admiralty best declares what was recognized as the law without the rule. That rule is to the effect that, in all suits for mariners' wages, the libellant may proceed against the ship, freight and master, or against the ship and freight, or against the owner or master alone *in personam*.

That the ship, as well as the freight, is bound for the seamen's wages, is well settled; and no distinction is made between the two liens which would charge the freight in priority to, and

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in discharge of, the vessel. (*Sheppard v. Taylor*, *supra*; *Lewis v. The Elizabeth & Jane*; Ware, 41; *The Dawn*, Davies, 121; *The Louisa Bertha*, 1 Eng. L. & Eq., 665; *The Lady Durham*, 3 Hagg. Ad., 196.) It certainly cannot be said, with propriety, that either of two funds is the primary fund for the payment of a charge, when the lien-holder may proceed against either or both, at his option, or against both with the individual personally liable for the payment of the claim, or against such individual alone. When it is said that "the contract of the sailors is a species of copartnership between them and the owners," it is only meant that the profits of the one and the wages of the other are at risk upon the same hazard, and depend upon the same contingency; and when it is said that the freight earned and received constitutes a common stock, and, in the hands of the owners, is a trust-fund, to be accounted for to those whose industry produces it, nothing more is intended than that the earning of freight gives the right to wages; that the freight is one of the funds upon which the lien for wages attaches; and that the equity of the mariner would attach to this fund in the hands of the ship-owner. It is not intended that the technical relation of trustee and *cestui que trust* exists, or that the ship-owner can be called to an account as for a trust-fund.

Judge STORY, in *Sheppard v. Taylor* (*supra*), gives the substance of the rule, when he says that "there is an intimate connection between the freight and the wages, and the right to the one is generally, though not universally, dependent on the other;" and this connection "has given rise to the quaint expression, that freight is the mother of wages."

Wages, then, are not chargeable upon the freight, in exoneration of the ship or the master or owner, or as a fund first or primarily to be resorted to. As between the underwriter upon the ship, who, as the abandonee thereof, is entitled to salvage, and the owner, who has abandoned to the underwriter, there is great propriety, in adjusting their respective personal rights and equities, that the wages of the crew should be first charged upon the freight. But this does not affect the general

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question of the mariners' lien upon the ship and freight is *solida*.

The crew of the Flying Dutchman, staying by the wreck and aiding to bring the vessel, with part of the cargo, into port, so that freight was earned by the vessel, became entitled to compensation for their services, not merely from the time of the casualty, but for the voyage. If that compensation was due them as salvors, then it should have been made a part of the general average of the expenses in saving the ship and cargo, or should have been charged upon the freight, or ship, or cargo, as a part of the salvage expenses. If the compensation was to salvors, as such, it would only be necessary, in adjusting the loss, to determine whether the amount should come into the general average or should be charged upon a particular interest. It would not, in that case, be chargeable upon the ship-owner personally, by reason of his hiring of the seamen as such. But, upon authority as well as upon principle, I am of the opinion that the compensation to the crew was as wages, and not in the nature of salvage. The question has more frequently arisen in cases where no part of the cargo has been saved, and consequently no freight earned, but where parts of a stranded ship have been saved, in part through the exertions of the seamen, and have been sold for more than sufficient to pay the wages of the seamen; and in England it is authoritatively settled that such a case constitutes an exception to the rule as to the earning of freight being a preliminary to the payment of wages, and that the seamen are entitled to wages if the salvage of the wreck is sufficient to pay them, and if not, to the amount saved. It is decided, and upon the same ground of reason and public policy that makes, in ordinary cases, freight the mother of wages, that the crew cannot assume the character of salvors of their own ship and claim for services as such. It is the duty of the crew to protect the ship through all perils, and their entire possible service is pledged to that extent; while a salvor is one who, without any particular relation to a ship, volunteers useful service to it in distress. An allowance to seamen as for salvage services

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would be less beneficial and safe to the owners than the allowance of wages. In the latter case, there is no temptation to throw the ship into situations of danger, with a view to extravagant salvage. (*The Neptune*, 1 Hagg. Ad., 227; and see Lord STOWELL's judgment in the case.) Some of the American cases allow a compensation to seamen equivalent to their wages in case of shipwreck, where they do their duty and sufficient is saved for that purpose, "by way of salvage," or "upon the ground of a qualified salvage;" but the result is the same as that reached by Lord STOWELL in the case of the *Neptune*. The seamen are not treated as salvors, and, in substance, effect is given to the lien of the crew for their wages upon every part of the ship that is saved from the wreck, and the case made an exception to the rule that the earning of freight is a condition precedent to the receiving of wages, although this exception is not stated in words. (See the cases cited in note [1] to Abb. on Ship., Story & Perk. ed., 758, top paging, and especially *Lewis v. The Elizabeth & Jane*, *supra*; *The Dawn*, *id.*; *The Sophia*, 1 Gilp., 77.) The doctrine of Lord STOWELL was directly affirmed by the Supreme Court of the United States in *Hobart v. Drogan* (10 Pet., 110).

That freight is the subject of an abandonment, like any other subject of insurance, is not doubted; and it is not disputed that it is subject to all the incidents of other insurable interests when abandoned to the underwriters.

By an abandonment, when the right to abandon exists, or the abandonment is accepted by the insurer, the whole interest in all that remains of the thing insured, so far as it is covered by the policy, is transferred from the assured to the underwriters in proportion to the amount of their several interests. The thing or interest insured and thus transferred is called "the salvage." The insurer becomes entitled to the net salvage; that is, that which remains of the subject matter after payment of the expenses of saving it. (2 Arn. on Ins., 1178; per Lord ELLENBOROUGH, Ch. J., *Sharp v. Gladstone*, 7 East, 24.) The expenses of saving the cargo and bringing it into

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port, from the time of the casualty or other interruption of the voyage which gives occasion to abandon, thus producing the freight, which is the salvage less the expenses, are properly chargeable upon the freight. These are the expenses incurred by or for the underwriter in the attempt to save something from the wreck for himself. What is saved belongs to the insurer, and not the insured; and, therefore, the expenses in the saving it are chargeable upon the former, although they exceed the value of the thing saved. But expenses incurred in and about the thing insured before the casualty, or in bringing it to the place of the casualty, are in no sense expenses incurred in saving the property from the peril insured against or pending the salvage. The maritime law gives the right to the insured to regard certain losses as total which are not absolutely total, and gives to the underwriter certain correlative rights; and among them, is the right of salvage. These losses are called constructively total; and, so far as the assured are concerned, the loss is total; for although the subject of the insurance is not actually destroyed, or wholly lost, he elects so to regard it, and exact of the insurer the full amount insured, giving to him what, if anything, can be saved. This rule is based upon reciprocal benefits to the insurer and insured. In consideration of the payment as for a total loss, when it is only constructively total, and incurring the risk and expense of saving the wreck, the underwriter becomes entitled to the thing saved, subject only to the charges in and about the saving it, and not subject to any other incumbrance. The fact that the insurer has been able to secure to himself the salvage to which he is entitled, does not give to the insured the right to charge him personally, or the property which he has thus purchased by accepting the abandonment, with any claim for services of mariners or others anterior to the wreck of the vessel. It is true, the right of the seamen to wages became fixed by the earning of freight, consequent upon the exertions of the defendant. But the wages were earned before the defendant acquired the title to the thing insured; and the earning of the

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freight was only the happening of a contingency upon which the technical right to recover for such services depended. The wages were earned before the casualty, but, whether payable or not, depended upon the circumstance of earning freight, or saving a portion of the wreck of the vessel; but when the right to wages was established, they were chargeable upon the ship or the owner, rather than upon the freight transferred to the defendant. It being determined that the seamen recover wages as such, and not compensation as salvors, it follows that the amount paid them is no part of the salvage expenses, and ought not to be deducted from that which goes to the abandonee. The charge and lien of the crew do not spring or grow out of the perils insured against, and must therefore be discharged by the insured, or the insurers must be allowed or paid the sum they pay, or are bound to pay, by reason of these burdens, and to secure the salvage. The abandonees take the subject abandoned, whether freight, ship or cargo, free from all charges or incumbrances created by act of the master or owner. They take the ship free from any lien for seamen's wages earned before the time from which the abandonment takes effect, although, as we have seen, the parts saved are subject to a lien for such wages at the suit of the mariners, and no freight is earned. The underwriter, in adjusting the loss with the insured, is entitled to be allowed such sum as he may pay to release the ship from the lien. (2 Parsons' Mar. Law, 418; 2 Arnould on Ins., 1188.) As between the insured and the underwriter on the cargo of a ship, the latter is in no case responsible for the payment of freight, whether there be an abandonment or not. It is a charge on the cargo, against which he does not undertake to indemnify the owner; and the existence of a lien on the cargo for freight does not vary the legal responsibility of the underwriter on such cargo after the abandonment. (*Case v. The Baltimore Ins. Co.*, 7 Oranch, 858.) So the wages of the mariner, so far as they are a charge on the freight, are not a charge against which the underwriter assumes to indemnify the insured, whether the freight is abandoned or not.

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Mr. Arnould, in his *Treatise*, lays down the proposition that the abandoners of freight take as salvage the net proceeds of the freight ultimately earned, after deducting the cost of unloading the cargo on board, and the other "extra expenses of earning the freight rendered necessary by the casualty; but this does not include incumbrances or liens with which the property was burdened by the assured by contracts with third persons before the casualty took place, and not amongst the perils insured against." (2 Arn. on Ins., 1188.) *Barclay v. Shirling* (5 M. & S., 6), was the case of a policy on freight at and from the ship's port of loading at L to her port of discharge, with leave to call at intermediate ports, beginning the adventure in the goods from the loading as aforesaid, with leave to discharge, exchange and take on board goods at any port she might call at, without being deemed a deviation, and it was held to cover the freight of goods loaded at an intermediate port; and, therefore, when the ship, having sailed with a cargo loaded at L, was, during the voyage, cast on shore at an intermediate port, and lost a part of her cargo, and arrived at her port of discharge and earned freight, it was held that the assured, who had abandoned to the underwriter upon intelligence of the loss, and had adjusted with him as for a total loss, was liable to the underwriter for the freight of that part of the cargo loaded at the intermediate port, after deducting the expenses attendant upon procuring such freight. Richardson, for the plaintiff (the underwriter), urged that, "as to any deductions from the amount of this freight in respect of charges incurred at the Havana, it seemed that the expenses of the voyage, wages, &c., are charges which belong to the owner of the ship, and are not, properly speaking, salvage on the freight, and, therefore, ought not to fall upon the plaintiffs." This was not controverted by his adversary. Lord ELLENBOROUGH, Ch. J., after showing that the freight from the Havana was covered by the policy, added: "All the cases agree that he (the insured) is accountable for the subsequently received freight (freight received after the payment as upon a total loss). He cannot have both indemnity and freight also."

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Therefore the plaintiff is entitled in this case, deducting only such charges as belong to the freight, such as the expenses of loading the cargo, and the wages of the crew during the loading." BAILY, J., after considering whether the underwriter was entitled to the freight earned, said: "As to whether any deductions ought to be made, I think the charges incurred while the ship was detained merely for the purpose of getting repairs to enable her to complete her voyage ought to be set to the account of loss on ship for which the underwriter on ship will be liable. But as to any charges incurred while the ship waited at Cuba to obtain freight, or for the purpose of loading it when obtained, these ought, I think, to be deducted." HOLBOYD, J., concurred. The court only charged the underwriter, or the freight earned, with the expenses incurred after abandonment in earning the freight.

Sharp v. Gladstone (7 East., 24), more directly decides the question made here. There, while a ship was forcibly detained in a foreign port, the owner abandoned the ship, and then the freight, to the different sets of underwriters thereon, who paid as for a total loss; after which the ship was liberated, reshipped her cargo, and returned home, earning freight, which was received by the assured. Assuming that the assured in that case could abandon the freight to an underwriter, who was an underwriter on the ship, which, as the ship was a seeking and not a chartered ship, was thought by the court to be questionable, the court held that the ship and freight were salvage to the different underwriters, after deducting the following expenses, which should be apportioned between them according to their several interests: 1. The expenses of ship and crew in the foreign port, including port charges (besides the expenses of shipping the cargo, which exclusively belonged to the underwriters on freight); 2. Insurance thereon; 3. Wages and provisions of crew from their liberation in the foreign port till their discharge here; 4. Wages (provisions were supplied by the foreign government) to the crew during their detention. But the assured was held not entitled to deduct out of the freight received, payable to the underwriter on freight, 1. Char-

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ges paid at the port of discharge on ship and cargo; 2. Insurance on ship; 3. Diminution in value of ship and tackle by wear and tear on the voyage home. By Lord ELLENBOROUGH, Ch. J.: "The underwriters on freight, to whom it is abandoned, having paid as for a total loss, are entitled to the benefit of salvage; and the net salvage is that which remains of the subject-matter after payment of the expenses of saving it"—necessarily excluding wages of the crew for services prior to the happening of the event authorizing the abandonment.

The Columbian Insurance Company v. Catlett (12 Wheat., 363), in principle covers the case at bar; and the argument of Judge STORY is as applicable to the claim made by the plaintiffs here as to the defence interposed in that case. The decision was, that freight was not a charge upon the salvage of the cargo in the hands of the underwriter, whether the assured was the owner of the ship or not. Judge STORY said: "As between the owner of the ship and the owner of the cargo, the former has a lien upon the cargo for all the freight which becomes due and payable to him, whether it be full or *pro rata* freight. But freight is a charge on the cargo, against which the underwriters do not, in any event, whether of abandonment with salvage or of partial loss, undertake to indemnify the owner of the cargo. In order to obtain the salvage when in the hands of the ship-owner, it may become necessary for the underwriter to pay the amount of the freight for which they have a lien, as it may to pay any other charge created by the act of the owner of the cargo. But this does not change the nature or extent of the responsibility of the underwriters."

It is the gross freight that is insured, not the net freight, deducting the expenses of carrying it. (*Seves v. Columbian Ins. Co.*, 3 Caines, 43; 1 Arn. on Ins., 328); and if this had been a partial loss, or been so treated by the assured, and there had been no abandonment, the loss would have been adjusted with reference to the gross freight insured, without deducting for the wages of the crew or the provisioning of the ship in earning it; and the assured cannot be the gainer by availing himself of the right to abandon in the case of a constructive total loss.

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Mr. Phillips, in his treatise on Insurance, dissents from the decision in *The Colombian Insurance Company v. Catlett*, and adopts the dissenting opinion of Judge JOHNSON, and asserts the better doctrine to be that, on abandonment of the cargo, the salvage comes into the hands of the underwriter, subject to the charges of freight for the voyage that is covered by the policy. The same views and the same line of argument led him to the conclusion that the underwriters on freight must take the salvage subject to the deduction of the lien of the seamen for wages for services on the voyage insured upon. (2 Phil. on Ins., 409, 412.) But as the first proposition is in direct conflict with authority, so the last is without authority for its support, and is adverse to the current of authority and the principles which control in analogous cases; and, respectable as the authority of Mr. Phillips is, his opinion cannot prevail against these odds.

Judgment of the court below must be affirmed and judgment absolute given against the plaintiff, and the case must be remitted to the court below, to ascertain the amount due the defendants upon their counterclaim.

WRIGHT, J. It must be admitted that, if the ship-owner is to receive from the insurers his full freight, and they are to pay the wages of the seamen, he will be in a better condition than if the voyage had been safely performed; as, in the latter event, he would have received the freight, but been bound for the wages. But this consequence is not a sufficient reason, in itself, for charging the ship-owner with the wages. In the case of an absolute, total loss of vessel and cargo, he would also have been a gainer to the extent of the wages; and yet, if that had been the result, he would have recovered the gross freight without any deduction for wages.

The wages of seamen are a lien or charge upon the ship and the freight earned. If ship and cargo be lost, the wages are gone; but whatever shall be saved of ship and freight is pledged for the payment of wages. The ship-owner is personally liable for the wages of the crew; and his ship and its

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freight, as between him and the seamen, are equally liable for the payment. In this case, after the disaster, there was an abandonment by the ship-owner of the interest of the freight insured to the defendants, and accepted by them, which operated as a voluntary transfer of the freight by him, entitling him to receive the full value thereof as if earned. The defendants, as abandonees, acquired the entire interest in the subject insured, and were entitled to the salvage, subject only to such claims as are legally and equitably chargeable as against insurers. After the abandonment, the owner saved from the fragments of the vessel more than sufficient to satisfy the wages; and also as much of the cargo as produced freight to the amount of \$4,276.87, which he collected. There was, therefore, enough of savings from either source to pay wages; and the point is, as between the plaintiff and defendants, who should answer for them. Two considerations naturally arise in determining the question: 1st. Are the savings of the ship or the freight primarily liable to wages? and 2d. What are the charges subject to which an insurer takes a subject on abandonment? There is very little authority on the question, whether the salvage of ship or freight are to be primarily resorted to for the payment of wages, when the salvage of either is sufficient to satisfy them. Undoubtedly the seaman has a lien upon both, and may pursue it; but I am not aware of any decision or principle of maritime law to require him to primarily enforce his lien on freight savings when there shall be enough of the savings of the ship to satisfy it; or, where no disaster befalls the ship and freight is earned, that he must first resort to the freight, and not to the ship, for his wages. The mariner's contract and lien have a prior origin as to the ship than as to the freight. The lien commences on the ship before the freight is earned, and endures even if freight is not saved sufficient to pay wages, provided he stay by the ship; and what is rescued is first liable to pay wages. The ship is naturally the first object looked at by the mariner as a pledge. It is a visible, certain subject, which he can appreciate, and with which he contracts, and, as we all know,

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practically, to which he first resorts. Freight, being the earnings of the ship in the course of the voyage, is the natural fund out of which the wages are contemplated to be paid; but the ship is also bound by the lien of wages, and, as between the owner and seaman, the former being the proprietor both of ship and freight, the latter is not driven primarily to the freight for indemnity; nor can I see upon what principle the freight should be first exhausted, and the vessel only resorted to when it proves insufficient. In the case of *The Dawn* (Davies, 121), it was said by Judge WARE that, "where the interests of third parties are involved, as between underwriters when the ship and freight are insured by separate policies, it would seem, upon principles of natural law, that the freight ought first to be exhausted, and the vessel resorted to only as a subsidiary fund when the freight proves insufficient." What principle he refers to is not clear, unless it be that which he had previously enunciated, that "freight is indeed the natural fund for the payment of wages; and the seamen have a privileged claim against it." If it should be conceded, however, that, by any principle of maritime law, as between insurers of the ship and insurers of the freight, the freight is the primary fund for the payment of the seamen's wages, it would not follow that, as between the owner of the ship and the abandoner of the freight, the principle would apply. The ship-owner is the absolute proprietor, both of ship and freight; and, when he parts with freight for its full value, cannot be supposed to create a lien in derogation of his grant. If there were an incumbrance embracing the whole subject, by the ordinary equity it becomes a primary charge on what is retained by the grantor. If, before the disaster, the ship-owner in this case had granted the pending freight to third persons, it would have implied the obligation on his part to pay all the ordinary expenses of earning the freight. The disaster occurring can only vary this obligation by subjecting the grantees to the extraordinary expenses growing out of the disaster. On principle, therefore, it would seem to me plain that the ship and the remnants saved should bear the wages in preference to abandoned freight.

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2. When there has been an abandonment of freight, the salvage belongs to the insurers. The subject may, however, be incumbered by charges for which the insurers are answerable, and which loss they must bear. What are the burdens, charges, or liens upon the salvage that the abandonees of freight are subject to, and must bear? Only such as are created by the occurrence of the peril insured, and not those which, in the ordinary course, would be incurred by the subject, whether the peril had happened or not. Writers on maritime law and insurance declare it to be an elementary principle that the insurers are only to pay liens arising from the peril insured, and not from perils not insured against. Parsons, in his treatise on Maritime Law, says: "The salvage of course belongs to the insurers; but if it be incumbered by any charge or lien by a peril against which they have insured, they are, of course, answerable for this, and bear the loss. But if the salvage have burdens, charges or liens upon it, springing from perils which are not insured against, this must be the loss of the insured, who must discharge their burdens, or pay or allow to the insurers the sum they pay, or are bound to pay." (2 *Par. Mar. Law*, 418.) So, also, it is said in *Arnould on Insurance*: "The abandonees of freight take as salvage the net proceeds of the freight ultimately earned, after deducting the cost of reloading the cargo on board, and the other expenses of earning the freight rendered necessary by the casualty; but the same rule does not extend to incumbrances or liens with which the property is burdened by the assured by contracts with third parties before the casualty took place, and not arising out of the perils insured against." (2 *Arn. on Ins.*, 1183, *Am. ed.*)

By the abandonment, the insured, I think, in this case, became a trustee for the insurers as to all the subject insured which might come to his hands afterwards, and subject only to such claims on his part as were legally and equitably chargeable as against the insurers. The mariners' wages were not a charge of that description. It was not a burden springing from any peril against which the underwriters had insured.

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They did not guarantee the insured on freight against the wages by the aid of which, in part, it was earned; but the wages were an incumbrance, or lien, with which the assured had burdened the property before the casualty took place, and not arising out of the peril insured against. It was a burden created by the ship-owner on his vessel and freight. By the abandonment of the freight insured, he, in equity, transferred to the insurers, not as a mere incident to the ship, but as an independent subject, capable of separate existence, and to be separately regarded, the existing freight, and received its full amount from them as if it had been earned. It would be contrary to principle that he should deduct any part of the ordinary charge of earning it. He should discharge the burden himself, or pay or allow to the insurers the sum they pay, or are bound to pay.

My conclusions are, that the seamen's wages should not have been deducted from or paid out of the freight, but out of the savings of the ship. The freight apportioned to the ship was \$2,565.70; exceeding the unpaid part of the sum insured by \$65.70.

The order of the Superior Court granting a new trial should be affirmed, and judgment absolute rendered against the plaintiffs.

DENIO and GOULD, Ja., concurred with ALLEN, J.; SMITH, J., concurred with WRIGHT, J.; DAVIES and SUTHERLAND, Ja., were also for affirmance.

Judgment absolute for defendants, and case remitted to ascertain the amount due them for overpayment.

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Devise of an estate for life to the testator's father, remainder to the heir-at-law and only child of the testator, "after the decease of my father, and when he the said child shall become twenty-one years of age, and become married, and has children, and in case of his the said child's decease before that period and after my father's decease, then the said real estate" was given over to other persons: *Held*, that

The child took a vested remainder, subject to be divested only on his dying under the age of twenty-one.

Upon the death of the life-tenant, the child became entitled to possession on his attaining twenty-one, or, *it seems*, upon his marriage and having children before that age.

The rule reiterated, that *and* is to be taken for *or*, and *or* for *and*, when required by the intent and meaning of the will.

APPEAL from the Supreme Court. Action to compel the specific performance of an agreement, made between the plaintiff's intestate and the defendant, whereby the former agreed to sell, and the latter agreed to purchase, a certain lot in Clinton street, in the city of New York, whereof the plaintiff's intestate claimed to be seised in fee. The complaint alleged that Elisha Burrows, Senior, the father of the plaintiff's intestate, being seised in fee of the said house and lot in Clinton street, made his last will in 1834, in due form of law, to pass real estate, wherein and whereby he gave a life estate therein to his father, John Burrows, and charged thereon an annuity of \$60 a year to the mother of the plaintiff's intestate, and then gave and devised the same unto the plaintiff's intestate, Elisha Burrows, the younger, "after the decease of my father; and when he, the said child, shall become twenty-one years of age, and become married, and has children, and in case of his the said child's decease before that period, and after my father's decease, then the said real estate" was given over to other persons.

The complaint sets forth, that John Burrows, the father of the said child Burrows, the elder, died in May, 1842; and that

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Elisha Burrows, the younger, attained the age of twenty-one years on the first day of April, 1854; and that he on that day entered into the possession of said premises, and has ever since continued to possess and enjoy the same; but that the said Elisha Burrows, the younger, had never been married, or had any children. It also alleges that the mother of the plaintiff's intestate had released and conveyed to him all her claim and interest of, in and to, the said premises. It also alleges that the said plaintiff's intestate is the only child and heir-at-law of the said Elisha Burrows, the elder, deceased. To this complaint, the defendant interposed a general demurrer; and judgment was given for the defendant at special term on the demurrer, which having been affirmed at general term, the plaintiff appealed to this court.

William S. Sears, for the appellant.

C. A. Nichols, for the respondent.

DAVIES, J. It seems to me that it was the clear intention of the testator that his son Elisha, on the demise of John Burrows, the testator's father, should take the estate in fee, upon his arriving at the age of twenty-one years. He was also to take it, upon such demise, upon his marriage and having children. It vested in him in fee, on the death of the life tenant; and he was entitled to the possession on the happening of either of those events, subject to his being wholly divested on his dying before attaining the age of twenty-one years; and on the happening of which latter event, the devise over took effect; and it only took effect on his dying before the age of twenty-one. He has attained that age; and the devise over can, therefore, never take effect. The life tenant having died, the contingency having happened upon which the estate was to vest absolutely in Elisha Burrows, the younger, and the annuitant having released to him all her claim, right and interest in the premises, the question presented for adjudication in this case is, can he convey to the defendant a good title, in fee simple, to the premises which he has agreed to purchase?

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We think he can. The first question presented is, in whom is the estate vested? Supposing the testator had stopped with the language, "when he, the said child, shall become twenty-one years of age," and the words "and become married, and has children," had been omitted, it cannot be doubted that the estate vested in the plaintiff's intestate, and on his attaining the age of twenty-one, and the death of the life tenant, his right of possession and title would have been absolute and perfect, subject to the annuity, the devise over not taking effect if he attained that age.

A devise to A, in fee, when he attains the age of twenty-one years, becomes a vested remainder, provided the will contained an intermediate disposition of the estate, or of the rents and profits during the minority of A; or if it directed the estate to go over in the event of A dying under age. (4 Kent, 234.) In the present case, there is an intermediate disposition of the estate; and a direction that the estate go over in the event of the plaintiff dying under age. The proposition laid down is, therefore, fully met by the facts in this case; and the authorities cited to sustain it will be referred to. They will elucidate the doctrine sought to be maintained. In *Bracton's Case* (3 Coke, 19), the will was, "when the said Hugh shall come to his age of twenty-one years," then the estate was given to him and his heirs forever; and it was held that the use of the word "when" was a demonstration of the time when the remainder to Hugh should take effect in possession, and not when the remainder should vest. Hugh having died at the age of nine years, his brother became his heir, who demised the premises to the defendant. It was alleged on the part of the plaintiff that no remainder was vested in said Hugh until he attained the age of twenty-one years; and that, in the meantime, the lands did descend to the daughters of the elder son, who were the general heirs of the devisee, and through whom the plaintiff claimed; and inasmuch as Hugh did never accomplish his said age, the land never vested in him, but remained in the heirs general. But so the court did not think, and gave judgment for the defend-

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ant. In *Good Title v. Whitby* (1 Burr., 228), where the estate was given "when and as they shall attain their respective ages of twenty-one," Lord MANSFIELD held, that the rule is, that that shall not operate as a condition precedent, but as a description of the time when the remainderman is to take in possession. In *Edwards v. Hammond* (8 Lev., 182), a copyholder surrendered to himself for life, and afterwards to the use of his eldest son, and his heirs, if he should live to the age of twenty-one years, provided, and on condition, that if he should die before twenty-one, then it should remain to the surrenderer and his heirs. On the death of the surrenderer, the youngest son entered, and the eldest son, being seventeen, brought an ejectment; and the question was, whether it was a condition precedent or subsequent? And the court held it to be a limitation to the eldest son immediately, defeasible on a condition subsequent.

Bromfield v. Crowder (4 Bos. & Pul., 818,) was a case sent by the Master of the Rolls to the judges of the Common Pleas for their opinion. In that case, the testator gave all his real estate to the plaintiff, "if he shall live to attain the age of twenty-one years;" "but in case he die before he attains that age, then to another brother; but in case both should die before attaining the age of twenty-one years, then to his godson John Vale and his heirs forever." The testator gave a life estate in the premises devised, after the death of his widow, to one Joshua Rose; on the death of his widow, Rose entered into the possession of the estates, and enjoyed the rents and profits till his death, on the twenty-seventh March, 1802. The plaintiff was then an infant, under the age of twenty-one, and filed a bill, asking that his rights in the estate might be declared. The parties defendant were Crowder, the heir-at-law, and Charles, brother of plaintiff, and John Vale. On behalf of Crowder, the heir-at-law, it was insisted that the plaintiff had no right or title to the estate; for that the devise to the plaintiff, and to his brother, and to Vale, were contingent remainders, limited upon estates for life; and that, inasmuch as the preceding particular estates were at an end

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before the events happened on which said premises were to become vested (the attaining of the age of twenty-one years), such remainder could not then take effect, and the estate consequently passed to the heir-at-law. The judges certified their opinion to be, that the fairest construction that could be put upon the will, independent of authority, was, that the plaintiff took an immediate vested estate, on the death of the preceding devisee, with a condition subsequent, and that, in the event that had happened, the plaintiff took a vested estate, in fee simple, in the estate of the testator, determinable upon the contingency of his dying under the age of twenty-one years. It would appear, from the remarks of Lord ELLENBOROUGH, Ch. J., in *Roe v. Briggs* (16 East., 411), that a decree was made by Lord Chancellor ERSKINE, in accordance with the opinion of the judges of the Common Pleas, and that an appeal was taken from his decree to the House of Lords, which was there affirmed.

Doe v. Moore (14 East., 600) is even more like the present case than those already cited. There, the testator gave to John Moore, "when he attained the age of twenty-one years," all his estate, &c.; but in case he should die before he attains the age of twenty-one years, then he gives it over. The testator died, leaving the lessors of the plaintiff his heirs-at-law, and the devisees named in the will were all under the age of twenty-one years; and the question reviewed was, whether the lessors of the plaintiff, or any or either of them, as heirs-at-law of the testator, or otherwise, took any and what interest in the estate. The case was argued in Hilary term, 1807, but stood over for judgment till Michaelmas term, 1811, awaiting the decision of the House of Lords in *Bromfield v. Crowder* (*supra*). In this case the rule was held to be, that a devise to A, when he attains twenty-one, to hold to him and to his heirs, and if he dies under twenty-one, then over, does not make the devisee's attaining twenty-one a condition precedent to the vesting of the interest in him, but the dying under twenty-one is a condition subsequent, on which the estate is to be divested.

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In the case now at bar, the devisee has attained the age of twenty-one, the life estate has terminated, and the annuity charged thereon released; and if there was nothing else in the will, it would, we think, be very clear that, on attaining his majority, he became vested with the estate absolutely in fee. But it remains to consider the effect of the additional words, "and becomes married, and has children." If the first "and" may be read "or," there is no difficulty in sustaining the title of the plaintiff's intestate in fee to the premises devised to him.

The judges of the Common Pleas, in *Broomfield v. Crowder* (*supra*), say: "It must be admitted that, according to repeated decisions, no precise words are necessary to constitute a condition precedent in wills. They must be construed according to the intention of the parties; and it would be absurd, considering the various circumstances under which wills are made, to require particular terms to express particular meanings. *The apparent intention, as collected from the whole will, must always control particular expressions.*" Now, what is the apparent intention of this testator, Elisha Burrows, Senior, as gathered from the provisions of the will? The devisee, it is admitted, was his only child and heir-at-law. Nothing can be more clear than that the father intended that his father, John Burrows, should enjoy the income of the property during his life; and upon his death, it should vest in the plaintiff's testator, and he to have the absolute possession thereof on his attaining the age of twenty-one years. We think it was also his intention, that he should have the estate on his marriage and having children, even if those events happened before he attained the age of twenty-one years, subject, of course, to be divested if he died before attaining that age. It cannot be justly argued that the intention of the testator was to deprive the plaintiff's intestate of the use and enjoyment of this property, after he arrived at the age of twenty-one years, until he got married and had children. In other words, he was to be kept out of its use until both these last named events should happen. It may be remarked, that the estate is not devised over on any such contingency; and it may well be assumed,

that the testator did not intend to deprive his son of the enjoyment of it if both of these events should not occur. No difficulty or doubt can remain as to the true construction of this clause of the will if we read the clause, "*or* becomes married," &c., instead of "*and*," and if, to effectuate the intention of the testator, such reading becomes necessary, we have an abundance of authority for so doing. The history of the course of decisions on this subject in England is given by Chief Justice KENT, in *Jackson v. Blansham* (6 Johns., 56). In *Prie v. Hunt* (Pollex., 645), the devise was to the son, in fee, with a remainder over, depending on the same contingency, of his dying before the age of twenty-one, or without lawful issue. The son arrived to full age, but died without issue. The remainderman claimed the estate, and brought an ejectment against the heir-at-law of the son. Lord Chief Justice POLLEXFEN has penned a very able argument in favor of the defendant, and which he delivered himself; and the judgment was given for the defendant. It was admitted that the word *or*, if taken in its proper grammatical sense as a disjunctive, might subvert the plaintiff's title; but it was contended for as an established rule, that the words *or*, and *and*, are not, in deeds and wills, to be always held to a strict grammatical sense; but *or* is to be taken for *and*, and *and* is to be taken for *or*, as may best comport with the intent and meaning of the grant or devise. The doctrine was not, however, definitely settled in England until the decision of *Fairfield v. Morgan* (5 Bos. & Pull., 88), in 1805, which was brought from the King's Bench, in Ireland, to the House of Lords. A devised lands to B; but if he should die before he attained the age of twenty-one, or without issue living at his death, then a devise over to C. B attained the age of twenty-one, and died without issue. It was held, first in the C. B., then in the King's Bench, in Ireland, and finally in the House of Lords, in England, that *or* must be construed as *and*; and that the devise over to C did not take effect.

In *Jackson v. Blansham* (*supra*), the question was on the construction of the words in a will: "But if any one or more

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of my above named children die before they arrive at full age, or without lawful issue, that then, his, her, or their part or share of my estate shall devolve upon, and be equally divided among, the rest of my surviving children." Mathew, one of the sons, died without lawful issue after he was of full age; and the court held it was settled, that the devise to Mathew became absolute as soon as he arrived at the age of twenty-one, though he had no lawful issue, and that the devise over did not take effect. Chief Justice KENT added: "It is now to be hoped that the question, in the construction of these words in a will, will never hereafter be revived. It is important that when a question of this kind has become once settled (and it is almost immaterial which way), that it should not be disturbed, for it grows into a landmark of property."

It is to be regretted, that after the rule has been settled and recognized in this State for fifty years, that it should again be reopened for discussion. We think the rule, as thus settled, should be adhered to; and that, in all cases, *or* is to be taken for *and*, and *and* is to be taken for *or*, as may best comport with the intent and meaning of the grant or devise. We think the intent of the testator is clearly deducible from the whole tenor of this will; that his son was to have the estate absolutely on his attaining the age of twenty-one; and that it was not suspended until he became married and had children. We think, therefore, in this case, we may read the word "*and*," before the words "becomes married," "*or*," and then the estate has become absolutely that of the plaintiff's intestate, and a good title can be made to the defendant thereto.

Judgment should have been given in the Supreme Court for the plaintiff on the demurrer.

Judgment reversed.

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24	471
f164	62
e164	150
164	151

In an action by a father, as administrator of his wife, who was killed by negligence, leaving children, the value of her earnings, and the probability, that the children would have received an estate increased by such earnings on the death and intestacy of their father, cannot be considered in estimating damages.

But the injury to the children, in the loss of maternal nurture and education, is a pecuniary one within the intent of the statute, and a proper ground of damages.

It seems that in such an action, evidence of the habitual occupation and employment of the deceased is admissible, to show her general capacity and relation to the family.

ACTION to recover for the death of the plaintiff's intestate (who was also his wife), from injuries resulting from the alleged negligence of the defendants, brought pursuant to the acts of the legislature authorizing such actions. The intestate was a passenger upon the defendants' railroad in January, 1860, when a collision took place between a freight train and the passenger train in which she was traveling, by which she was so badly injured that she died a few days afterwards. No question was made but that the collision arose from negligence on the part of the defendants' servants. Up to the time of the injury, the plaintiff and his wife lived together at Grafton, in Rensselaer county. They had a family of five children, four of whom were minors, the youngest being nine years old. The plaintiff was a carpenter, and was much of the time at work away from home. The wife, besides attending to her household and taking care of her children in the usual manner, carried on the business of making shirts, upon the employment of wholesale dealers in New York, who furnished her the materials. It was not claimed that she carried on any business on her own account; but it was alleged in the complaint, and shown on the trial, that the business was that of her husband. The evidence of her being engaged in that

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business was received against the objection of the defendants' counsel, who excepted to the ruling. Evidence was given, touching the practice of the deceased of teaching her children, and instructing them in household duties, and those who were girls in sewing. The defendants' counsel moved for a nonsuit, on the ground that no damages, such as the statute contemplates, had been shown; and that being refused, he asked for an instruction that nominal damages only could be given, which was also denied. The judge instructed the jury that the plaintiff was not entitled in this action to recover any damages which resulted to him as husband, on account of the death of his wife, but that it was as the representative of his children only that he was entitled to recover, and that it was their pecuniary loss for which damages were to be given. In estimating those damages, he charged them that they were first "to inquire what the woman was worth, over and above her own support, to her family; what was this woman fairly worth; what could she earn, over and above the expenses of her own support and living." That part of the charge was excepted against by the defendants' counsel. It was afterwards qualified by the judge, observing that the children could not be considered as having lost the earnings of the deceased, for those, he said, belonged to her husband; but if he should retain them until his death, they would pass, in the absence of a will, to his children, or to his wife and children if he left a wife. He then proceeded as follows: "Yet, although the father does survive, you may take into consideration the increase that the earnings of this woman would ordinarily have added to the common stock, in view of the reasonable probability that, upon his death, even though he survived his wife, the children would inherit all his real and personal property; and may estimate the fair pecuniary value of the chance that, in the ordinary course of things, the earnings of the wife would have gone, through the husband, to the children." This part of his charge was also excepted against. Questions were made upon some other parts of the charge, which it is not supposed material to mention. The judge

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charged that the following proposition, which was propounded by the defendants' counsel, was true in the form presented: "That the plaintiff was not entitled to recover anything as for any value of the deceased to her children in their nurture or education."

The verdict was in favor of the plaintiff, for \$4,000 damages. The defendants appealed from the judgment of affirmance rendered at the general term.

Thomas M. North, for the appellants.

David L. Seymour, for the respondents.

DENIO, J. One ground of estimating the damages, which the jury were instructed to take into consideration, was the expectancy of the children of the deceased in the fruits of her earnings in the business of making shirts, in which she was engaged. It was conceded that these earnings, immediately upon being realized, became the property of her husband; and that the only way in which the children could be benefited by them would be by succeeding to them as the next of kin of their father, in the event of his continuing to own them, of their surviving him, and of his dying intestate. It seems to me that this is too remote, and that it is not within the meaning of the statute. If the children should have become the possessors of these anticipated earnings, it would not be as the next of kin of their mother, but on account of their sustaining that relation towards their father. The gravamen of the claim in that aspect is, that, by the wrongful act of the defendants, they have been cut off from the succession to wealth, which, but for the untimely death of their mother, occasioned by that act, she would or might have earned. But this injury does not happen to them as her next of kin. In that character, it would be unimportant to them whether their mother continued to realize earnings or not; for all such earnings would immediately vest in the plaintiff, as husband, and could never come to them as her next of kin. The construction of this statute, it must be admitted, involves great

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difficulties; and the grounds and measure of damages cannot always be determined by the application of the ordinary rules of the common law. If the deceased in this case had been a widow, and had been engaged in a profitable business, rendering it probable that, if her existence should be prolonged to the average period of life, she would acquire wealth, I am not prepared to deny but that her death, by the wrongful act of another, would entitle her children to damages under the provisions of this act, on account of being thus deprived of the probable succession; for though the cause and the effect would be too remote from each other to found a claim to damages by the rule of the common law, such a ground of damages may have been within the contemplation of the legislature in passing the statute. Next of kin are embraced in its language, as parties who may be pecuniarily injured by the death of a person to whom they stand in that relation; and it is not required that the degree of kindred should be such as to create the duty of sustenance, support or education. It is well settled, that the survivorship of a wife is not essential to the maintenance of the action. (*Oldfield v. The N. Y. & H. R. R. Co.*, 14 N. Y., 310; *Quin v. Moore*, 15 id., 434.) Suppose the only kindred to be collaterals, between whom and the deceased there was not legally or conventionally any connection which would impose such duties upon him; yet, by the terms of the act, damages in such a case must still be measured by the pecuniary injury resulting to such next of kin. As regards the existing property of the deceased, they would not be pecuniarily injured by his death; but, if he left no will, they would be immediately benefited by the amount of the property he then possessed. The only loss such parties could sustain would be of the further accumulations, which it may be supposed he would have added if he had continued to live, and which might, at his more remote decease, have devolved upon them. This is sufficiently vague and uncertain as a ground of damages, and could not be allowed, except on account of the peculiar provisions of the statute, and the impossibility of giving it effect in certain cases, except under

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such a construction. But the rule laid down at the trial allowed damages to be given upon quite a different ground, involving another series of contingencies. At the death of the victim of the defendants' negligence, the next of kin of the deceased are definitely determined, and are capable of immediate ascertainment; but it would then be quite impossible to determine who will be the next of kin of the husband, and entitled to succeed to his estate, when at some more distant and uncertain period he comes to die. Those who now are presumptively such, may or may not then be alive; or if alive, their number may be increased by the birth of others, or another share in his estate may arise in the person of a second wife. The rule of damages laid down would, in my judgment, be far too speculative and uncertain for actual application.

It will not be essential to pass upon the other exceptions, except so far as may be useful for the purposes of another trial. We think it was not improper to allow the plaintiff to show the habitual occupation and employment of the deceased, for the purposes for which it was offered and received on the trial, namely, to show her general capacity and relation to her family. It is true that the testimony on that point was made to assume proportions beyond what seems to have been necessary for the purposes mentioned; but, it being competent, it was for the judge to determine the extent to which the examination might be carried.

The injury to the children of the deceased by the death of their mother was a legitimate ground of damages; and we do not agree with the defendants' counsel, that they ought to have been nominal. The difficulty upon this point arises from the employment of the word *pecuniary* in the statute; but it was not used in a sense so limited as to confine it to the immediate loss of money or property; for if that were so, there is scarcely a case where any amount of damages could be recovered. It looks to prospective advantages of a pecuniary nature, which have been cut off by the premature death of the person from whom they would have proceeded; and

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the word *pecuniary* was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money. It excludes, also, those losses which result from the deprivation of the society and companionship of relatives, which are equally incapable of being defined by any recognized measure of value. But infant children sustain a loss from the death of their parents, and especially of their mother, of a different kind. She owes them the duty of nurture and of intellectual, moral and physical training, and of such instruction as can only proceed from a mother. This is, to say the least, as essential to their future well-being in a worldly point of view, and to their success in life, as the instruction in letters and other branches of elementary education which they receive at the hands of other teachers who are employed for a pecuniary compensation. Suppose a person under obligation to furnish a minor apprentice with common school instruction for a given period: would not the violation of that duty furnish a claim for damages? The injury would be of the same character which a child suffers from the loss of the training and instruction which it is entitled to receive from its parents. The injury in these cases is not pecuniary in a very strict sense of the word, but it belongs to that class of wrongs as distinguished from injuries to the feelings and sentiments; and in my view, therefore, it falls within the term as used in the statute. It is argued by the defendants' counsel that there should be no recovery on these grounds, because the father is obliged to provide what the children have been deprived of by the loss of their mother. But this is not an adequate answer. The children have been deprived of that which they were entitled to receive, by the wrongful act of the defendants. Their loss may or may not be made up to them from another source; but, in the meantime, they are entitled to a fair and just compensation from the wrongdoers by the provisions of this statute. The damages given by the statute are the pecuniary injuries sustained by the widow, and the next of kin

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of the deceased resulting from such death; and which next of kin, in the present case, are the children of the deceased. The recovery must, therefore, be confined to the pecuniary injuries which they and they only have sustained.

The judgment of the Supreme Court must be reversed and a new trial ordered.

DAVIES, SUTHERLAND, and ALLEN, Js., concurred; GOULD, J., was for reversal, on the ground that only nominal damages were recoverable.

SMITH, J. (dissenting.) The plaintiff's right, as administrator of his wife, to maintain this action, is settled by the cases of *Quin v. Moore* (15 N. Y., 432), *Oldfield v. The Harlem R. R. Co.* (4 Kern., 310). The right of the administrator to sue under the statute, these cases held, depends upon the question whether the deceased person could have maintained an action at common law, if the injury causing the death had not proved fatal. The exception, therefore, to the decision of the circuit judge, refusing to dismiss the complaint, is not well taken. The exceptions remaining relate to the principles governing the question of damages. The exceptions to the admission of evidence relating to the capacity and services of the deceased in the care and nurture and education of her children, and in the support of the plaintiff's family, and particularly in carrying on the business of making shirts, bosoms and collars, all present substantially the same questions which arise upon the charge, and need not be separately considered. If the case was put to the jury upon a correct theory, upon the question of damages, the objections to the evidence referred to in these exceptions were all properly overruled; and the exceptions are not well taken. In the case of *Dickens v. The New York Central R. R. Co.* (28 N. Y., 158), the action was by the husband, as in this case; but the deceased left no children, and her next of kin were sisters, who could not be next of kin to the husband; and it was held that the action could not be maintained by the husband for the loss of the

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services of his wife on his own account, and that the next kin of his wife had no interest in such injuries. But in this case, the deceased left a family of five children, who would be of kin to the plaintiff, and be entitled, upon his decease, to inherit his estate. The case of *Dickens*, therefore, is not a decision of the question, that the character, nature and value of the services of the wife was not admissible upon the question of damages, when the action is really brought for the benefit of her children.

The charge of the judge, to which there are various exceptions, taken as a whole, is substantially correct, if anything more than nominal damages are recoverable in such cases; and does not, I think, contain any erroneous direction. It states that the recovery in such an action can only be for the pecuniary loss sustained by the death; that the statute gives no right to recover for the pain and anguish of friends, or the loss of the solace and comfort which the children would have derived from their mother; and that the plaintiff could not recover anything as husband of the deceased.

That the jury should inquire what the deceased was worth to her children over and above the expenses of her own support and living: that this was to be determined by considering how long, in her state of health, she could probably have lived: that the earnings of the mother did not belong to the children, but to the plaintiff or her husband; and that the only interest the children had in such services depended upon the question how much they would tend to increase the estate of their father in view of the probability that upon his death the property of the plaintiff would go to her children—this is the substance of the charge; and while it is vague and somewhat indefinite, it is no more so than the act itself, and presents, I think, no single point that is clearly erroneous. The statute declares (Laws of 1849, p. 388,) that, in every action brought under said act, "the jury may give such damages as they shall deem a fair and just compensation, not exceeding \$5,000, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person."

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The statute gives no clear and certain rule of damages. It gives the action to the "*widow and next of kin*" of the person killed, seemingly as though no one could ever be killed except a man and a husband who might leave a widow and children. The husband is not named in the act, and no action is given to him for killing his wife, but the action being given to the "*next of kin*" in such cases, the damages must be determined upon the same principles, so far as they can be ascertained, that will apply when the husband is killed. If the deceased in this case had been a widow, supporting her children by her own skill and services, no doubt could exist that her death would be a pecuniary loss to her children upon the same principle, though probably not in the same degree, with the death of their father. The equity of the statute should be extended to, and would clearly embrace, such a case. The difficulty is to apply the statute to the case of the death of a mother of a family, the father being still living. On this point, I do not think that portion of the charge of the judge in which he stated to the jury that, in assessing damages, they might assume that the children of a family will succeed to their father's estate upon his decease, and that their pecuniary loss resulting from the death of their mother may be the amount that her earnings would ordinarily have added to the common stock, clearly erroneous.

It suggests to the jury an approximate rule for estimating the pecuniary loss sustained by this death, easily applied and much more certain and definite than any other that can be devised. I can conceive of no other practicable measure of damages, or rule to guide the discretion of a jury in such a case, having reference to the pecuniary loss of the children. It was not presented as a rule of damages binding upon the jury as matter of law, but as a rule to guide their discretion in carrying the statute into effect. The evidence given in respect to the capacity of the deceased and the value of her services in the support of the family was, therefore, properly received, as furnishing a proper item for consideration in estimating the compensation to be assessed to the next of kin.

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Our statute was taken from the English act known as Lord CAMPBELL's act (9 and 10 Vict., c. 98), and should receive the same construction so far as they correspond in terms. The English act gives the action for the benefit of the wife, husband, parent and child, and directs that the jury apportion the damages to the parties respectively, for whom and for whose benefit such action shall be brought.

The case of *Cotton v. Wood* (98 Eng. Com. Law, 566), was a case like this, where the person killed was the mother of several children; and the action was brought by the husband, as administrator of his wife, as well for himself, as the husband of the deceased, as for the benefit of his three infant children. At the trial, on the part of the plaintiff, it was proved that the deceased had by industry contributed to the extent of about ten shillings weekly towards the maintenance of the family, and a verdict of £25 was recovered; apportioned by the jury, £10 to the father, and £15 to the children. No objection was made to the evidence at the trial, and no objection that the recovery, both in behalf of the husband and the children, was not to be had upon the same principles. This case was reviewed in the Common Pleas, upon a motion for a new trial, and a new trial granted upon other grounds; but no suggestion was made in the argument, or in the opinion of the court, that the evidence, showing the value of the services, was improper, or that the children were not entitled to recover, upon the basis of the value of such services, precisely like the father.

Unless pecuniary loss can be inferred by the jury, and deduced from evidence, showing the value of the services or the worth of the person killed, upon such basis as was suggested in the charge of the judge in the case, the fair compensation of the statute, recoverable by the children of a deceased mother—the father living at the time—must necessarily be limited to their nominal damages. The legislature intended to give an action to the widow and next of kin whenever a clear and appreciable pecuniary loss was sustained by the death of any person resulting from the

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"wrongful act, default or neglect of another." They did not intend to give an action for speculative, or imaginary, but real loss, which could be shown and clearly determined with reasonable certainty.

It was impossible, perhaps, to define with exactness the rule of damages applicable to such case. There is an intrinsic difficulty about fixing in the statute any certain and definite rule on the subject. Much was, therefore, and necessarily must be, left to the jury. But in such a case, it is of the utmost importance that a jury, called upon to assess damages resulting from the death of a person, be guided by some clear instructions. It has been, and is, doubtless, a matter of much embarrassment to judges at the circuit to present this class of cases to juries upon clear and precise principles—such as shall confine them to the rule of pecuniary loss, and exclude the considerations relating to the pain, distress and anguish caused by the sudden death of a relative from the gross negligence of another, and a purpose to punish such negligence by a vindictive verdict. Such, doubtless, were the considerations controlling the jury, to a large extent, in this case. But this statute treats human life simply as an article of merchandise, to be paid for in a verdict for damages, at its precise pecuniary value. Such is the conceded construction and intent of the act. Upon this view of the statute, the verdict in this case is exorbitantly large, and, I think, should have been set aside by the Supreme Court, and a new trial ordered upon this express ground. The deceased was a woman, forty-eight years of age, in poor health, and not possessed of a strong constitution. I think the jury should, in substance, have been instructed to consider how much she could earn annually, over and above the expenses of her own support and living, upon the same principle as if she was hired for wages to render the same services for her life. This should be considered in respect to her age, state of health, and circumstances and condition in life; and then, what would be the present worth of such annuity, calculating the ordinary duration of human life. This would have fixed the value of her life. Assuming, which

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I think a very liberal estimate, that she would earn, upon an average, \$100 a year for the period of her life, by the Northampton tables the present worth of an annuity of \$100 for life, of a person aged forty-eight years—the age of the deceased—would be \$970. If the jury had assessed the plaintiff damages at \$1,000, it would perhaps have been a fair and liberal verdict.

But we cannot reverse this judgment upon any such ground. The judge was not asked to make his instructions more definite. He charged, as the defendant asked him to do, upon all the specific requests, except that the plaintiff could only recover nominal damages, and that the amount of the verdict could not exceed the value of the possibility that Mrs. Tilley might, but for the injury, have survived her husband, taken in connection with the pecuniary value to her children of her life, if she did so survive.

The judge refused to charge as requested upon this proposition, and, I think, properly. It did not present the true rule of damages. It suggested a rule too vague and indefinite for any practicable application. I think the judgment should be affirmed.

SELDEN, Ch. J., and WRIGHT, J., took no part in the decision.

Judgment reversed and new trial ordered.

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A contractor for the construction of part of a railroad is not a laborer or servant, within the provision of the general railroad act, making stockholders personally liable for the debts of the corporation.

APPEAL from the Supreme Court. Action to enforce an alleged personal liability of the defendant, as a stockholder in the Albany Northern Railroad Company, an insolvent corporation, organized under the general law of 1850. It appeared

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on the trial that one Decker was a contractor with the corporation for grading and constructing a portion of its road. The Company being indebted to him for the services of himself, his laborers and servants under such contract, gave him its promissory note for \$2,047 in part payment. This note was transferred by Decker to the plaintiff's intestate; and, being protested, he recovered judgment against the corporation for the amount thereof, upon which execution was returned wholly unsatisfied. The court held, the plaintiff taking an exception, that the indebtedness for which the note was given was not a debt owing to a laborer or servant of the corporation, and directed a verdict for the defendant. Judgment thereon having been affirmed at general term in the third district, the plaintiff appealed to this court.

John K. Porter, for the appellant.

Orlando Meads, for the respondent.

Selden, Ch. J. It appears from the pleadings that the payee of the note, upon which the action is brought, was a contractor with the Albany Northern Railroad Company, of which the defendant is a stockholder, for the construction of a part of its road; that the note was given to him for an indebtedness growing out of such contract; and the question presented by the demurrer is, whether, as such contractor, he is entitled to the benefit of that clause of section 10, of the general railroad act of 1850, which provides, that "all the stockholders of every such Company shall be jointly and severally liable for all the debts due or owing to any of its laborers and servants, for services performed for such corporation;" in other words, whether he can be regarded as a laborer or servant of the Company within the meaning of the act.

It is obvious from the nature and terms of this and other provisions of the act, as well as from a general policy indicated by analogous statutes, that the legislature intended to throw a special protection around that class of persons who should actually perform the manual labor of the Company. To

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accomplish this design, it is not necessary that the words "laborers and servants" should receive their broadest interpretation. Indeed, such a construction would scarcely harmonize with the general scope and object of this and similar acts. In some very extended sense, the directors and other principal officers of the corporation may be considered as its agents and servants, and yet no one, I apprehend, would contend that the provision was intended for their benefit. The word "servants" is qualified, and to some extent limited in its meaning, by its association with the word "laborers," according to the familiar maxim, *noscitur a sociis*. It clearly would not include every one who should perform any service in any form for the Company. Such a construction is repelled, not only by the apparent reason for the enactment, but by the language used, which would naturally have been far more general if such had been its object.

Precisely where the line should be drawn between the different classes of persons who may perform services for such a Company, it may be somewhat difficult to determine; but it is unnecessary to attempt this discrimination in the present case; as it would be necessary to give to the word "servant" the largest and most extended signification possible in order to include within it those who have made contracts with the Company to construct a portion of its road; and even then, I hardly see how the word could be held to include this class of contractors, especially if it is understood in any of its ordinary acceptations, as it should be, unless there is something in the case to point to a different interpretation. If, however, it might be possible to construe the word, under some circumstances, so as to include contractors, all the indications in the present case tend to a limited instead of an enlarged interpretation. Contractors, therefore, are not, in my opinion, embraced in the terms, or entitled to the benefits, of the provision. The judgment of the Supreme Court should, I think, be affirmed.

ALLEN, J., delivered an opinion to the same effect.

All the judges concurring,

Judgment affirmed.

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The tolls imposed, at the time of the adoption of the Constitution of 1846, on freight carried on railroads, were not, within the meaning of that instrument, part of the revenues of the State canals, though payable to the commissioners of the canal fund.

The act (ch. 497 of 1851), repealing the laws imposing such tolls is, therefore, consistent with article 7 of the Constitution, which irrevocably pledges the revenues of the canals to the payment of certain debts, and to their completion; and the act is valid.

APPEAL from the judgment of the Supreme Court sitting in the second district, affirming the judgment of Justice BROWN at the Orange Circuit, dismissing the complaint.

The action is to recover tolls which would have accrued and become payable to the State from the defendant, and the several corporations which were consolidated and merged in the defendant at its organization, under laws in force when the present Constitution of the State was adopted, had these laws remained in force.

The defendant, "The New York Central Railroad Company," came into existence in 1853, by the consolidation of several railroad corporations, under the provisions of chapter 76 of the Laws of 1853. The provisions of the charters of the several companies merged in the defendant, concerning the carriage of merchandise and freight other than the baggage of passengers, and the toll or tax to be paid upon the merchandise and freight carried when the right existed, were not uniform; the right to carry such freight not being conferred upon some of the corporations, while to some the right was granted during parts of the year, and to others during all the year; some being compelled to pay toll upon the property transported, from which other companies were exempt. In 1844, by statute, the right was conferred upon all the roads to carry freight, during the suspension of canal navigation, and the companies were required to report to the commissioners of the canal fund

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as they should direct, and, with certain exceptions as to local freight on some of the roads, to pay to the said commissioners "the same tolls per mile on all the goods, chattels and other property so transported, as would have been paid on them had they been transported on the Erie canal." This law was in force when the Constitution of 1846 was adopted. In 1847 the law was amended, and in 1851 it was repealed, and the right to carry freight without the payment of toll granted to the several railroad companies. It is claimed by the plaintiffs that the last mentioned act is in contravention of the Constitution, and, hence, that the defendant, as the successor in interest and liability of the several consolidated companies, is indebted to the State for the tolls, under the acts of 1844 and 1847, upon all the goods transported by the several roads after December, 1851, when the repealing act took effect, and before the organization of the defendant, and by the defendant, since the consolidation.

Charles G. Myers (late Attorney-General), for the appellants.

Lyman Tremain (with whom was *A. C. Paige*), for the respondent.

ALLEN, J. An elaborate or extended discussion of the rules of constitutional and statutory interpretation, would be out of place at this time. The recent and frequent consideration and application of these rules by the courts has made them quite familiar, and leaves us but little to do in this case, important and interesting as it is, but to suggest them as their application becomes necessary in the progress of the discussion. One or two general remarks, particularly applicable to a written Constitution, may be proper, as connected with the first and most important canon in the interpretation of written instruments.

A Constitution is an instrument of government, made and adopted by the people for practical purposes, connected with the common business and wants of human life. For this reason preëminently, every word in it should be expounded in its

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plain, obvious and common sense. (Story on Const., § 451; per JOHNSON, J., *Newell v. People*, 3 Seld., 97.) Intimately connected with this idea, and giving force to the principle of interpretation resulting from it, is the fact prominently put forth by Judge DENTO, *arguendo*, in *Newell v. People* (*supra*), and which, while it commends itself to the good sense of all, is abundantly supported by authority, that a written Constitution, framed by men chosen for the work by reason of their peculiar fitness, and adopted by the people upon mature deliberation, implies a degree of deliberation and a carefulness of expression proportioned to the importance of the transaction, and words are presumed to have been used with the greatest possible discrimination. Chief Justice MARSHALL, in *Gibbons v. Ogden* (9 Wheat., 188), in interpreting a provision of the Constitution of the United States, says: "As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said."

Judge JOHNSON, in *Newell v. The People*, speaking of the rule that "that which the words declare is the meaning of an instrument," says: "This is true of every instrument; but when we are speaking of the most solemn and deliberate of all human writings, those which ordain the fundamental law of States, the rule rises to a very high degree of significance." In the language of Judge BRONSON, in *People v. Purdy* (2 Hill, 31), "we are not at liberty to presume that the framers of the Constitution, or the people who adopted it, did not understand the force of language." In construing and giving effect to a written Constitution, wherever the language of the instrument is clear, it must be taken to express the mind and will of the people; and to depart from it by substituting another interpretation, under pretence of giving effect to the intent of its framers, would be dangerous and mischievous in the extreme.

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The first and fundamental rule in the interpretation of all instruments, and especially necessary to be observed in the interpretation of a written constitution for the government of a State, as we have seen, is to give effect to the meaning of the parties; and this meaning is to be sought in the words primarily, and, in case of ambiguity or doubt, in the context, the subject matter, and the reason and purpose of the instrument. Words are generally to be understood in their usual and most known signification, unless they have acquired a technical meaning; and then it is the office of interpretation to determine, by reference to the context, the subject matter, and the circumstances under which they are used, whether they are used in the ordinary or in a technical sense. When the words are plain and free from ambiguity, and of themselves having a distinct and perfect idea, they require no interpretation; and it should only be indulged from a clear necessity, either to escape some absurd consequences or to guard against some fatal evil. (Story on Const., §§ 400, 401, 405; *Newell v. People*, *supra*; Smith on Const., 649, 651; *McCluskey v. Cromwell*, 1 Kern., 593.)

The question first in importance presented upon this appeal grows out of the direction given by the State Constitution to the "canal revenues;" and is, whether the toll or tax, imposed by laws in force at the time of the adoption of the Constitution upon merchandise carried by railroad companies, was included within that term, and made a part of the "canal revenues" appropriated by the seventh article of that instrument.

The first section directs that, "after paying the expenses of collection, superintendence and ordinary repairs, there shall be appropriated and set apart in each fiscal year, out of the revenues of the State canals, in each year, commencing on the first day of June, one thousand eight hundred and forty-six," certain sums, as a sinking fund for the payment of the canal debt; and that "the principal and income of the said sinking fund shall be sacredly applied to that purpose."

The second section, after complying with the provisions of the first section, appropriates and sets apart "out of the sur-

plus revenues of the State canals" certain sums for the payment of the general fund debt, with a like declaration of the sacred application of the "principal and income of the said sinking fund" to the purpose indicated.

The third section directs that, "after paying the said expenses of superintendence and repairs of the canals, and the sums appropriated by the first and second sections of this article, there shall be paid out of the surplus revenues of the canals to the treasury of the State" certain sums for the use and benefit of the general fund; and that "the remainder of the revenues of the said canals shall" be applied to the completion of the canals mentioned.

The fifth section provides that if the sinking funds, or either of them, should prove insufficient to meet the claims upon them, the legislature should, by equitable taxes, "so increase the revenues of the said funds" as to make them sufficient to preserve the credit of the State; and that "every contribution or advance to the canals or their debt from any source, other than their direct revenues, shall," with interest, be "repaid into the treasury for the use of the State out of the canal revenues, as soon" as it can be done, consistently with the just rights of the holders of the canal debt.

Seeking the meaning of the framers of the instrument only from the words they have used, and giving these words their ordinary signification, the sense in which they are popularly used, and in which they would be understood by the people who adopted, and for whose government the Constitution was intended, the "revenues" of the canals would include only the income derived from the "State canals." This would include tolls, penalties, and rents of surplus water, and any other return which the State might receive from the capital invested in the canals. Revenue, when used of individuals, is equivalent to income, which is the true sense generally used to designate the annual receipts, and includes receipts from all sources—at least, all permanent sources of profits or rent. Revenue is more generally used to designate the income of the government, arising from taxation, duties and the like. The

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proceeds of lands or public stock sold would not be included as a part of the revenue of a State. (Story on the Const., § 877.) The State canals cannot possess a revenue or income. They may be a source of profit, that is, revenue, to their owner. In the interpretation of a Constitution, we may not look for "metaphysical or logical subtleties, for niceties of expression," for metaphor, or figures of speech of any kind; and we are not at liberty to suppose that the framers of the article under consideration, either from necessity or choice, intended to impersonate the "State canals," and treat them as capable of taking and holding property, being entitled to and receiving an income. It is not necessary, in order to give effect to the instrument. Every word can have full force given to it without doing so great violence to the rules of interpretation. Even if the language were not critically accurate to denote the profits or income which should accrue to the State from the use of the canals, and "revenues from the canals" would have been the more appropriate expression, still, critical propriety is not essential to the right understanding of the provision; and it would be safer to convict the framers of false grammar than, in the exercise of a critical acumen, and to save them from this error, to give to the principal idea an unusual and figurative meaning. But I think the language well chosen to convey the idea, and restrict the legislative power over the receipts from the canals. "Revenue" is a return for capital invested or labor bestowed. In a general sense, it is the annual rents, profits, interests or issues of any species of property, real or personal, belonging to an individual or the public. (Web. Dic.; *People v. Supervisors of Niagara*, 4 Hill, 20.) The "produce of taxes, excise," &c., is the amount they yield to the State. The "revenue" or "income" of a farm is the sum total which its owner receives from it. It is not the money borrowed by the owner, or an annuity which he may own and may have pledged to pay for it, or the money invested in stock, farming utensils, or fertilizers put upon it. The canals, as the property of the State, were a source of income to it; and the "revenues of the canals" was significant,

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as denoting that income. There is no ambiguity in the words, and therefore no occasion for resorting to the other aids allowable in the interpretation of doubtful or ambiguous phrases. In other parts of the sections quoted the same form of expression is used to describe the receipts from a given fund or capital; as where, in sections one and two, the principal and income of the sinking funds are mentioned. The framers distinguished very clearly between the annual payments, or contributions to those funds, and the profits arising from their investment; and did not deem it necessary to mention the latter as the "income from" the capital, but used the same preposition, "of," as when giving directions concerning the "revenues of the canals." The other parts of the sections, embracing the provisions under consideration, give no countenance to the claim, that anything but receipts from the canals were intended by "the revenues of the State canals." The "expenses of collection, superintendence and ordinary repairs," in the first and third sections, can refer to nothing but the canals, and cannot, by any latitude of interpretation, embrace railroads or any other subject; and yet, they have no more intimate connection, but, precisely the same, in the section with "State canals" that "revenues" have. To suppose that in the one phrase the framers intended just what they said—the expenses attendant upon the management of the canals—and in the other they meant contributions of all kinds for canal purposes, and all restrictions and impositions upon commerce for the benefit of the canals or to increase their trade, would be to convict them of a carelessness and a want of appreciation of the importance of giving clear and distinct expression to their meaning, which would be unjust, and a violation of the rule which implies care and deliberation in such a transaction. The direction in the fifth section for the repayment from the canal revenues of every contribution or advance to the canals, or their debt, from any source other than their direct revenues, is in harmony with and supports the interpretation given to "canal revenues." In the preceding paragraph of the section the legislature were enjoined

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to increase the revenues of the sinking funds, for which provision had been made in the sections immediately preceding, with a view to sustain the public credit and preserve the public faith, by equitable taxes, if the funds or either of them should at any time prove insufficient to satisfy the claims of creditors as they became payable. One of these sinking funds was for the payment of the canal debt; and hence the provision referred to, that every contribution or advance from any source, other than their direct revenues, was to be a charge upon the canal revenues. Had it been contemplated that the sinking fund for the canal debt was to be made up in part of taxes upon commerce, tolls upon railroad freights, or other auxiliary or indirect contributions, the framers of this section would not have been so careful to indicate that all contributions and advances, other than from the direct revenues of the canals, should be repaid from such revenues. The provision for a repayment of the advances was intended as an equitable adjustment of the accounts between the direct revenues of the canals, which had been appropriated in the preceding sections, and the other funds and revenues of the State which might be used in their aid in an emergency and to meet demands upon them.

The words in question, as used by the framers of the Constitution, have a clear, distinct and definite meaning, well understood and easy of application, in the sense in which they are popularly used, and as they would be understood by the people in adopting the instrument, and are used with propriety in that sense in the places in which they occur, and convey to the reader an intelligent, clear and practical idea upon the subject to which they relate. By themselves, the sections in which they occur are perfect establishing a complete, permanent system as connected with the canals, and giving permanent direction to the revenue to be derived from the canals, and adjusting the claim of the general fund upon them and providing for its payment. There being no ambiguity in the terms employed, or doubt growing out of the language, there is no room for interpretation or occasion or propriety to resort

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to those extrinsic aids which are sometimes necessary when the instrument is not, by its directness and clearness of expression, its own interpreter. It is only when the language is not thus distinct and free from doubt that the intention and meaning of an instrument may be sought from other sources. It is a pregnant fact that it was only after twelve years of administration of the Government under the Constitution—a period extending over more than one-half the contemplated existence of the instrument—that it was first suggested that, possibly, “canal revenues” meant something more than was indicated by the term, and included other sources of State revenue and other subjects of taxation; and this suggestion was not based upon the language of the instrument, but upon extrinsic facts, and, in disregard of the primary rule of interpretation, by seeking to create a doubt, rather than to remove it, which is the office of extrinsic facts, when brought in as aids of interpretation.

But if, departing from the rule referred to, we resort to the context, the subject matter, the past legislation and financial history of the State, and the reason and spirit of the requirement, to see if some meaning may not be given to its language other than that which it evidently imports, the result will not be different.

The seventh article of the Constitution declares, that the capital of the funds therein named shall be preserved inviolate, and directs to what purposes the “revenues of” the several funds shall be appropriated. Here the revenues of those funds is the form of expression adopted by the framers as equivalent to “income” from those funds. These funds, or the capital invested and constituting them, are ranked as property yielding a revenue to the State, but it is spoken of as “the revenue of” the funds. What is intended by it is the annual produce of these funds, and the same language is used in the seventh article, to distinguish and give direction to the income from the State canals. The “revenue of the common school and the literature fund” did not embrace all the casual or extraordinary or even the ordinary contributions to the capital

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of the funds or the aids and auxiliaries to the revenues of those funds, which have been contributed from year to year as the necessities of schools and institutions of learning required. The necessity of keeping separate accounts with the several funds and sources of revenue of the State, with reference to the objects to which distinct portions of the revenue are appropriated and set apart, has given occasion to the convenient form of expression adopted, which fully answers the desired purpose, and effectually and intelligibly secures the public against a misappropriation or a diversion of the public funds from the purpose to which they are directed. The object being a very simple one, it was not necessary to seek critical accuracy in the use of words or resort to an elaborate, special phraseology to accomplish it. It was thought best to do it by such simple and natural designation of the subject matter as would be easily understood and could not mislead.

From an early period in the history of the State, distinct funds were created for special purposes, and the income from these funds, or the "revenues of" such funds, applied to the respective objects in view in their creation. Among these were the "common school fund," the "literature fund," and the "general fund," which latter of late years is only known by the debt charged upon it, the fund itself being a myth. The legislature have, from time to time, designated and set apart to these several "funds," as belonging to the particular department of government named, certain stocks, debts, property, and other sources of revenue, and declared that the subjects so set apart and designated should be known as the particular "fund" mentioned. (1 R. S., 189, 196, 197.) The existence of these "funds" is recognized by the Constitution, and certain of the funds, not, however, including the "canal fund," it is declared "shall be respectively preserved inviolate." (Const., art. 9.) Except as prohibited by the Constitution, these funds, as well their capital as their income, have been ever subject to legislative control. The canal fund is only incidentally mentioned in the Constitution of 1846, in naming the "commissioners" of that fund. (Const., art. 7, § 5.) If the tax on

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merchandise transported upon railroads had been, at the time of the adoption of the Constitution, a part of the canal fund, it would nevertheless have been subject to legislative control, and would not have had the sacred and inviolable character impressed by the Constitution upon the common school, literature, and United States deposit funds. The only way in which such tax could have been devoted to canal purposes without a strange departure from the ordinary method of managing the State finances would have been to make it a part of the "canal fund," as has been done in some instances. One such instance is to be found in the Laws of 1841, chapter 238, section 4. But even in that case it would not have been beyond the reach of ordinary legislation, as the Constitution, declaring certain funds inviolable, does not include within the number the canal fund. *Expressio unius est exclusio alterius*. The "canal fund" was created in 1817 (Laws of 1817, p. 301), as a part of the system of internal improvement then inaugurated, and then consisted of all such appropriations, grants and donations as might be made by the legislature of the State, by the Congress of the United States, by individual States, and by corporations, companies and individuals.

By the fifth section of the same act, salt and auction duties and the tax upon steamboat passengers, commuted by the act of 30th of March, 1820, were pledged and appropriated to the construction of the canals and the payment of the canal debt; and yet, although thus devoted, the Constitution of 1821 regarded them, not as "canal revenues," but as auxiliary funds, and distinguished between them and canal tolls, or "revenues of the canals" proper, while it made the appropriation of them to the purpose indicated equally inviolable. (Const., art. 7, § 10.) By the act of 1817, the net proceeds of the canals, when made, were also pledged and appropriated to the payment of the canal debt. This is precisely what the Constitution of 1846 does, that is, it appropriates the "net proceeds" of the canals; and yet the framers of the Constitution of 1821, taking the law of 1817 as the basis of their action, did not regard this item as embracing the other funds devoted to the

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same purpose by the same act, but, with much unnecessary verbiage and circumlocution, if the plaintiffs are right in their construction, dealt specially with each item which they intended to pledge to the work of completing the canals. In 1830, the canal fund consisted of seven distinct items, only three of which were the earnings or products of the canals, to wit, tolls and commutation moneys, moneys received for penalties and damages under the canal laws, and moneys received for the sale or use of surplus waters. (1 R. S., 298.)

The other contributions to the canal fund were always regarded as funds "auxiliary" to the canal revenues proper, or the "net proceeds" of the canals, and were so known in official and legislative reports and documents, and they were so treated and distinguished by the Convention that framed the Constitution of 1846, and in the report of the Comptroller, made in answer to a call of the Convention for the different items of the canal fund, and "the revenues of the Erie and Champlain canals for each year, and their expenses for repairs, superintendence and collection, and their net revenues," and "the revenues of all the canals, as a system, for each year, and their net revenues." The information called for was given in different tables, classifying the different items of the canal fund, and reporting the "auxiliary funds" by themselves, and the "revenues of the canals," that is, tolls, &c., in a table by themselves. (Conv. Doc., No. 47.) It is not reasonable to suppose that the Convention immediately forgot or intentionally disregarded the form of their inquiry and of the report, as well as the distinction between the "State canals" and the "canal fund," and between the "revenues of the canals" and the "auxiliary funds." The "revenues" of or from the canals were the subject of annual official reports to the legislature, and had, at the time of the sitting of the Convention in 1846, a well-defined meaning, and were understood as including only the receipts from tolls, surplus waters, &c., and thus induced the particular form of the inquiry for the statistics, to enable the Convention understandingly to consider the State finances as particularly connected with the canals. (See the annual

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reports of the Commissioners of the Canal Fund, and especially for the years 1839, 1840 and 1842.) It is claimed that, by the Constitution of 1821, not only were the tolls of the canals, at the rates then fixed, pledged for the completion of the canals and the payment of the canal debt, but, also, the faith of the State was pledged against, and the legislature were prohibited from doing, any act or authorizing any work which should divert trade from the canals, and thus diminish the receipts: that this view was taken of it by the legislature, and acted upon in granting railroad charters and in the imposition of railroad tolls. From this it is argued that, in 1846, tolls proper, and that which was a substitute for canal tolls, that is, the tax upon merchandise carried by the railroad companies, and which could not be constitutionally carried by the railroad except upon the payment of an equivalent to answer the constitutional pledge, were regarded as "revenues of the canals," any part of which was equally sacred, and pledged to the same purposes by the Constitution then adopted. If the premises are wanting, the argument must fail. I will not spend time in considering the restrictions upon the legislative power claimed for the Constitution of 1821. It is sufficient to say, that the regulation of all matters connected with the internal traffic and commerce of the State, the development of its wealth and resources, the advancement of its material interests, either by constructing or authorizing the construction of routes and means of communication and commerce between different parts of the State by land or water, is clearly within the legislative power, which, by the Constitution, is vested in the Senate and Assembly. A restriction upon the legislature in respect of a matter which is properly the subject of legislation will not be implied, but must be clearly expressed. The implication claimed in this case is very far-fetched. It will not be presumed, in the absence of a clearly expressed intent, that it was designed to cripple the power of the legislature in so important a part of its duties, and to deprive it of the power to develop the resources of the State and attract within its limits the commerce and trade of other States by making

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available private enterprise or by creating other facilities for travel and transportation, or by any means which were accessible. (*People v. Draper*, 15 N. Y., 545; 21 Wend., 548; 1 Hill, 324; 18 Wend., 9; 19 N. Y., 445-468.)

There is no evidence upon the statute-book that the legislature gave to the Constitution of 1821 the effect claimed for it in behalf of the plaintiffs. The first railroad chartered was the "Mohawk and Hudson," between Albany and Schenectady, making the distance between the two cities less by one-half than by the canal; and thus very likely to interfere severely with the traffic upon the canal. This road was permitted to carry freight, and no tax or toll was imposed upon the freight so carried. (Laws of 1826, ch. 253.) The same may be said of the Troy and Schenectady Railroad Company, chartered in 1836. (Laws of 1836, ch. 427.) The railroad system was inaugurated by the incorporation of the Mohawk and Hudson Company; and in that, there is no recognition of the right of the canals to the carriage of all the merchandise that could be forced into that channel by the prohibition of every other means of transportation; and from that time railroad charters were granted with diverse provisions as to the carriage of freight, granting or withholding the right, and imposing tolls or not, as circumstances made it expedient in the eyes of the legislature; but, evidently, without any thought that the Constitution had anything to do with it. The Tonawanda railroad, incorporated in 1832, the Attica and Buffalo, incorporated in 1836, had the right to carry freight without the payment of tolls. The Auburn and Syracuse Railroad Company, incorporated in 1834, was authorized to carry freight, but was required to pay the same tolls as were paid on the Erie canal. The Syracuse and Utica Railroad Company, incorporated in 1836, was authorized to carry freight, but was required to pay for such goods as should be carried by it during the season of canal navigation only "such tolls as the canal board should deem proper, not exceeding" the rates charged upon the canal. If this toll or tax had been imposed in obedience to the Constitution, there could have been no

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discretion vested in the canal board; but it would have been the same as the canal toll. The Utica and Schenectady Railroad Company, chartered in 1833, was prohibited from carrying freight. The Auburn and Rochester, incorporated in 1836, was prohibited from transporting persons or property in such a manner as to lessen the income on the Erie canal during the time when the canal was navigable. It is not necessary to refer to other acts of incorporation. The entire want of uniformity in the charters renders them of no value as aids in the interpretation of the Constitution. There is certainly no evidence in any one of them, and less than none when all are looked at in connection, that the legislature supposed they were following a constitutional requirement in giving or withholding the permission to carry merchandise, or charging merchandise carried, or exempting it from the tax. In no instance, I think, save in the charter of the Auburn and Rochester railroad, were tolls imposed in respect to persons carried by the railroad companies; and yet, tolls on passengers were as clearly within the provision of the Constitution as tolls on merchandise. In 1844, permission was granted to the Utica and Schenectady Railroad Company to transport upon its railway goods, &c., upon the payment of the same tolls per mile on all the goods, &c., so transported, as would have been paid on them had they been transported on the Erie canal; and the necessary provision was made for the carriage of freight by the other connecting roads in the line of railroad between Utica and Buffalo, upon a payment of like tolls, except as to local freight upon certain of the roads having the right to carry such freight free of toll. The tolls to be paid under the act were directed to be paid to "the commissioners of the canal fund." (Laws of 1844, p. 518.) Perhaps, by the latter direction, the tolls received for property carried upon railroads may properly be considered as added to the "canal fund." It is not material whether this be so; for as part of the canal fund, as we have seen, it is subject to the legislative discretion, unless controlled by some express constitutional prohibition upon the legislative power. There

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is, then, nothing in the provisions of the act, or in the language or terms in which these provisions are embodied, to give countenance to the idea that these tolls were in any sense regarded as "canal revenues," or "revenues of the canal," so as to justify the inference that the latter term, in the Constitution of 1846, was intended to embrace them. But little will be gained by speculating upon the motives and policy of the act. If it be not established that the tax upon the railroad traffic was imposed in obedience to the requirements of the Constitution, then a knowledge of the inducements that led to the passage of the act would only be important to elucidate some doubtful or ambiguous provision. The act is clear and explicit in its terms, and needs no such aid to interpret it. If the canals could and would have secured the carriage of all the goods, &c., that were permitted to be transported by the railway companies, and the State would not be the gainer in its commerce, but would only lose by the amount of the tolls upon such as should be diverted to the roads, then, as the right granted was a boon to the roads, there was an apparent equity in charging the freight with the tax. The imposition of the tolls would be then simply a question of expediency or policy, and would belong exclusively to the statesman and political economist. If the springing up of rival routes for the commerce of other States, and the carriage of merchandise and produce which it was desirable, with reference to the interests of the whole State, to retain or acquire, with which the canals could not compete, rendered necessary the very facilities which the railways afforded, there was a good reason for conferring the power upon the railway companies to carry the freight, and the imposition of the toll would not be as a consideration of a boon, but would be referable to some other reason. Perhaps the necessities of the State might, in that view, be considered as having an influence upon legislative action in this respect. The financial history of the State, culminating in a great depreciation of the public credit, and the stoppage of the public works, and the necessity of a resort to direct taxation to keep the faith

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of the public with its creditors but ten years before the passage of this act, will not be forgotten. By an act passed the same year (ch. 314), money was authorized to be borrowed to pay arrearages to canal contractors, and other claims upon the canal fund, and a direct tax was levied for its reimbursement. It may be remarked, in passing, that, in the same act, the net earnings of the canals are called "the surplus of canal revenues," as they are called in the Constitution of 1846. But probably the necessitous condition of the State was regarded as a justification, if not as calling, for the imposition of tolls upon railroads, as an equitable tax upon trade that might otherwise directly contribute to the canal fund by way of tolls for transportation upon the canals.

The act of 1842 (Laws of 1842, ch. 114) has the same author as article 7 of the State Constitution; and we may suppose that language was used with at least the same care in the latter instrument as in the act referred to. They both relate to the same subject, and both embody the same general views and principles. In the act, at section 11, care is taken to distinguish between the revenue of the State canals from canal sources and revenue for canal purposes from the State tax; and when the latter is intended to be included in a disposition of the canal revenues, it is expressly mentioned. Had annual contributions from any source other than the canals been intended to be classed with and disposed of as a part of the canal revenues proper by the Constitution, language free from all doubt would have been employed for that purpose. If the act of 1842 does not throw light upon this part of the Constitution, there is no legislation that can aid us; and so far as that act speaks, it is against the construction urged by the plaintiffs.

The purpose and object of this part of the Constitution, so far as indicated by its terms, or to be inferred from the canal and financial policy of the State, do not favor the views and claim of the plaintiffs. 1. It was not adopted for the benefit of the creditors of the State, and as a pledge or mortgage of the revenues of the State for the payment of the debt. 2. It was not adopted to increase the revenues of the canals, or

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secure to them the commerce of the State, or protect them against competition or rivalry from any source. It was not the theory of the framers of the article that commerce was created or should be controlled for the benefit of any particular channel; but routes and channels were provided for the benefit and to meet the wants of commerce. It would have been a departure from the entire canal policy of the State in the past, by a rigid and unyielding constitutional restraint upon legislative power, to have made the greater interests of the whole State defer to the particular interests embodied in or represented by the "State canals" or the "canal fund." True, the different views and policy of different men are, from time to time, impressed upon the legislation of the State. But the general purpose and object of the canals are set forth in the preamble to the act of 1817; and there is no evidence that that purpose and object have ever been lost sight of or renounced. The purpose is worthy of the men who projected the enterprise, and of the State that accomplished it. It was, "to promote agriculture, manufactures and commerce, mitigate the calamities of war and enhance the blessings of peace, consolidate the Union, and advance the prosperity and elevate the character of the United States." Direct revenue was not among the objects and purposes of the great undertaking. It was an incident, and so regarded by the founders of the system. True, it was important that the work should, when completed, be self-sustaining, and desirable that it should yield a revenue; but the exalted and more important ends of the work—the blessings and benefits which were expected to result—were not intended to be sacrificed to the smaller benefits of revenue, especially revenue in excess of expenditure in the construction and maintenance of the works. 3. The purpose and object of article 7 of the Constitution, so far as it relates to the "revenues of the State canals," was, by the imposition of a restraint upon legislative discretion and action, to secure an economical administration of the earnings of the canals and the rigid and faithful application of them to the payment of the equitable claims upon them, and as justice to

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every part of the State and the different funds of the State required. If the canals could not, for any reason, accomplish the great purposes for which they were commenced and completed, but other facilities—the result of new inventions and new modes of travel—could effect the desirable object, there was no inhibition upon the legislature as to their employment, although the tolls of the canals might be thereby diminished. That is, the legislature were not, expressly or impliedly, enjoined to protect and guard the canals and their business and revenue at the expense of every other interest, by a prohibition from doing, or suffering to be done, anything that might diminish the receipts from canal sources. They were only told how to deal with the tolls they should receive, should they be more or less. They might reduce them to a nominal sum, if the interests of the State and its commerce should require it. It was not the intention of the framers of the Constitution to restrict, during the lifetime of a Constitution, the citizens of this State, either in their own business or in seeking to extend their commerce to other States and to build up our cities by intercourse with our neighbors, to the use of the canals, with all the speed which the enlargement will give, while Canada and Pennsylvania, Vermont and Massachusetts, are, with railroad speed and facilities, running away with the trade legitimately ours. If this was the plain language of the Constitution, legislators could only obey, and courts could not relieve against it. But such is not the language. On the contrary, it will not bear this interpretation, neither can such an intent be spelled out from it. It is also claimed that the sixth section of the seventh article of the Constitution, which prohibits the legislature from selling, leasing or otherwise disposing of any of the canals of the State, and requiring that they shall remain the property of the State and under its management forever, deprives the legislature of the power of doing, or authorizing to be done, that which may lessen the revenue from the canals, or permitting channels of trade to be opened which may divert business from the canals. Had the object of the framers of the Constitution been to secure the

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largest amount of tolls and revenue from the canals, we should have found some provision bearing directly upon the tolls, and either inhibiting the legislature from reducing the tolls at all, or enjoining upon it the duty of regulating the tolls so as to secure the greatest amount of revenue. But, so far from this, is the fact that the legislature have uncontrolled discretion over the tolls, and may reduce them to the lowest point, even to a nominal amount, or impose a duty on some articles and permit others to pass free over the canals, as the interests of the State shall dictate. The object of the sixth section was to keep the control and management of the canals in the State, in order that they might be so managed as best to subserve the interests of commerce and the great State and national interests to promote which they were constructed; and not to suffer them to pass into the hands of private monopolists and speculators, or the owners of rival channels and routes of trade, in whose hands they might be employed to destroy, rather than advance, the public good. As we have seen, a restraint upon, or a prohibition of the exercise of, the legislative power, will not be implied in any case, but must be clearly and distinctly expressed in the organic law, before courts will hold an act of the legislature void, as *ultra vires*. Most certainly, there is no reason to infer, in this case, above all others, that it was the intent of the framers of the instrument to deprive the legislature of any of its ordinary and legitimate power to legislate for the advancement of the prosperity of the State, by opening new means and facilities for trade, and new and improved sources of wealth, although the aggregate of canal tolls might be diminished.

I find no provision in the Constitution which, directly or indirectly, expressly or impliedly, forbids the legislature from releasing the tax upon merchandise transported upon the railways. The act of 1851, repealing the laws imposing the tolls upon goods so carried, was, therefore, within the legislative power, and is valid; and the judgment must be affirmed, with costs.

All the judges concurring,

Judgment affirmed.

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COLLUMB *et al.* v. READ *et al.*

Real estate, acquired with partnership effects in collecting debts due the firm, although so conveyed as to make the partners tenants-in-common at law, is, in equity, considered as converted into personalty, for the purpose of subjecting it to the debts of the firm, in preference to those of the individual partners.

The trustee under an assignment of land which is declared fraudulent at the suit of a creditor, is not bound to account for the rents received and applied according to the terms of the trust before the commencement of the suit, or the attaching of any specific lien on the lands.

APPEAL from the Supreme Court. The plaintiffs, as judgment creditors of George Caldwell and Robert Fero, commenced this action in February, 1859, to procure a satisfaction of their judgment out of the property and equitable interests of the defendants, and particularly to set aside certain assignments and mortgages of the defendants' property which were alleged to be fraudulent as against their creditors. The plaintiffs recovered a judgment in the Supreme Court against George Caldwell and Robert Fero, on the 18th day of September, 1848, for \$11,333.44, and on the 23d June, 1849, they recovered a like judgment against George Caldwell for \$1,272.29. They were duly docketed in Montgomery county, where the defendants resided, and executions were returned unsatisfied. It did not appear that Fero had any property, and no question was made respecting him. Prior to March 1, 1848, George Caldwell was the owner of considerable real estate, consisting of lots and buildings situated in the village of Canajoharie, which he, on that day, mortgaged to the defendant, Read, to secure \$8,275.10, with interest, in seven annual payments. On the same day, Caldwell mortgaged his household furniture to Read to secure \$500, payable by installments, the last payment of which would mature in three years.

George Caldwell and his brother, the defendant Joseph W. Caldwell, were partners as retail merchants at Canajoharie, and in the spring of 1848 the firm and both the partners were in

24	505
110	215
24	505
117	208
24	505
124	556
24	505
132	178
24	505
154	515

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insolvent circumstances, owing more than they could pay. On the 15th April, 1848, they sold and conveyed the goods constituting their stock in trade to Read for \$13,623.95. The price was arrived at by deducting fifteen per cent from the cost price of the dry goods, and twelve per cent from that of the hardware. For this sum Read gave his five notes, of equal amount, payable at nine, twelve, fifteen, eighteen and twenty-four months, with interest after twelve months. Read was the father-in-law of both the Caldwells. He had retired from business, and was possessed of a handsome property. On the 17th day of the same month of April, George Caldwell and the firm of G. & J. W. Caldwell each made assignments for the benefit of their respective creditors, with preferences. The defendants Read and Mitchell were trustees under the assignment of the firm, and Mitchell was a trustee under that of George Caldwell. One Ferguson was also a trustee under both assignments, but he declined to act under either. The assignment of the firm embraced three several pieces of real estate, being village lots, with the buildings thereon, the title to which was in George and Joseph W. Caldwell, who held under ordinary conveyances, which would make them tenants-in-common at law.

The case was first heard on pleadings and proofs before the late Justice DANIEL CADY, who decided that the assignment of George Caldwell was fraudulent and void, as against the plaintiffs; but that the assignment of the firm was valid. An account was ordered to be, and was taken, respecting the transactions of Mitchell the trustee. Appeal was taken from this judgment to the general term, where judgment was given, declaring the personal mortgage also fraudulent and void, and affirming, in other respects, the decision before Mr. Justice CADY. On an appeal to this court there was a general judgment of reversal, and the case was remitted, with a direction that a new trial should be had. The only question then passed upon here, was the validity of the assignment of the firm. That was considered fraudulent, for the reasons that it embraced real estate, the title to which was in the partners as tenants-in-com-

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mon, and that there was no evidence that it had in any way become partnership property. It was held to be subject to the same rule as though the lands had been the individual property of the separate partners, and as though George Caldwell had conveyed his moiety in trust for the payment of a part only of his debts, with a reservation of the residue to his own use. (16 N. Y., 484.) On the second trial, which was before Cornelius L. Allen, Esq., as a referee, evidence was given touching (among other things) the manner in which the real estate included in the joint assignment was acquired and held.

The referee found and decided, as matters of fact, besides the position upon which there was no dispute: 1. That the sale of the stock of goods was *bona fide* and without any intent to hinder or defraud creditors, and in point of law he held it valid; 2. That the several parcels of real estate embraced in the joint assignment "were, and each of them was, a part of the copartnership property of the said firm of G. & J. W. Caldwell; that the same had been acquired as copartnership property, with copartnership effects, in the collecting and receiving debts due the said firm, and had always been inventoried and treated, and were, at the time of said assignment, held as, and in fact were, a part of the copartnership effects and property of said firm;" and that the assignment executed by said firm was *bona fide*, and not fraudulent, and, therefore, he held that it was valid: 3. That the mortgage of land executed by George Caldwell to the defendant Read, to secure \$8,275.10, was for money justly due and owing, and was not fraudulent; and, as a conclusion of law, that it was legal and valid: 4. That the chattel mortgage was given for a debt to the amount proposed to be secured, due and owing from the mortgagor to the mortgagee, and was duly filed; but the furniture mortgaged remained in the possession of the mortgagor and in the use of his family down to the time of the trial. That Mitchell, as assignee, first sold the right and title of the mortgagors to these goods, in May, 1860, for \$40; but afterwards, in July in the next year, Read, the

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mortgagee, sold said goods at auction on the mortgage, and bid them in himself for \$418.30, which he applied in satisfaction of so much of the mortgage debt, and he afterwards conveyed them by bill of sale to his daughter, the wife of the mortgagor, without having ever taken any actual possession of them. As a conclusion of law, he found that this mortgage was void as against the plaintiffs' judgments and executions: 5. As to the separate assignment of George Caldwell, he states that the defendant Mitchell accepted the trust, and commenced to dispose of the property and to apply the proceeds as directed by the assignment, and continued to do so in good faith until the commencement of the suit, and that after suit brought he disposed of the real estate. In the conclusions of law he decided that this assignment is fraudulent and void as against the judgment of the plaintiffs. He did not state the facts on which his conclusion was based, but he added that the trustee's sales, made prior to the commencement of the suit and the application of the proceeds of the property, ought to be confirmed. As further facts on this branch of the case, he found that Mitchell had appropriated, in good faith, all the money he had realized as assignee according to the trusts of the assignment before suit brought; and that the money which he had received since the commencement of the suit, or which with diligence he might have received, was not equal to his necessary disbursements for the preservation of the assigned estate. The plaintiffs excepted to the most material of the points in this decision, so far as they were adverse to them. Judgment was rendered according to the decision of the referee. The plaintiffs were charged with the costs of the defendants, Read and J. W. Caldwell. As between the plaintiffs and Mitchell, no costs were given to either as against the other, as to the litigation respecting the assignment; but the sales and dispositions of property made by Mitchell, as assignee, under the assignment of George Caldwell, before suit brought, and the appropriation of the proceeds, were confirmed. The plaintiffs, however, were allowed their costs of the litigation respecting the chattel mortgage against George Caldwell.

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The plaintiffs appealed from so much of the judgment as was adverse to them, but none of the defendants appealed. Some other portions of the evidence are adverted to in the following opinion.

William D. White, for the appellants.

Francis Kernan, for the respondents.

DENIO, J. The most material question raised by this appeal is, whether the assignment made by the firm of G. & J. W. Caldwell was fraudulent and void on account of its embracing real estate the title to which was in the separate partners as tenants-in-common. If this real estate is to be considered as the individual property of the partners, and not as copartnership property, the assignment of it, to pay the partnership debts, with a reservation of the surplus to the assignors, who were, at the same time, insolvent as to their separate concerns, was fraudulent as against their creditors. This was the judgment of this court when the case came here after the first trial. (16 N. Y., 484.) But, upon the second trial, which eventuated in the judgment under review, evidence was given touching the manner in which this real estate was acquired, and was held; and the question is, whether, upon the finding of the referee upon these subjects, the case was such as to warrant the application of the equitable principle which permits the separate partners, or the creditors of the copartnership, to require the sale and appropriation of its real estate for the liquidation of its affairs. Where land is conveyed to two or more persons by a common deed of conveyance, they become tenants-in-common, and each is at law considered separately seized of his individual share, as fully as though they derived title under separate conveyances from different sources. But if the tenants-in-common are at the same time copartners, and the land was purchased with partnership funds, and for partnership purposes, it is deemed in equity converted into personal property, and is liable to be administered as such in winding up the affairs of the firm; and it goes, moreover, to

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the personal representative, and not to the heirs, of a deceased partner. (*Phillips v. Phillips*, 1 Mylne & Keene, 649, 668; *Broom v. Broom*, 8 id., 448; Bisset on Partnership, 56.) And I understand that the rule is the same as to the claims of creditors, if it be brought into the partnership by one of the partners for partnership use during the continuance of the concern, under an agreement that it should be considered partnership property; though, in this last case, the equitable conversion is not so absolute as that the personal representative would be entitled to the succession against the rights of the heir. (*Cookson v. Cookson*, 8 Sim., 529.) But suppose it be purchased with partnership funds or taken in payment of a partnership debt, but not to be adapted for employment nor actually used in the business of the partnership, but is yet to be kept on hand until the failure of the firm: is it applicable to the payment of partnership debts, or must it be applied to the payment of the debts of the individual partners, supposing them also to be insolvent? In *Randall v. Randall* (7 Sim., 271), it is held that the conversion of real estate into personal property in such a case must not take place so as to give the succession to the personal representatives of one of the partners who had died. Whether, if the firm and the partners had become insolvent, the creditors of the copartnership could have invoked that fiction of a court of equity against the creditors of an individual partner, does not appear to be distinctly settled in England. There is a class of cases in which it had been agreed, upon the formation of the copartnership or subsequently, to the effect that the real estate brought into the concern should be considered as partnership property. There, though the conversion is not absolute so as to change the succession from the real to the personal representatives, yet there is a qualified conversion so far as may be necessary for partnership objects; and the payment of partnership debts being one of the purposes of the partnership, the joint creditors have a right to call for its appropriation for the satisfaction of their demands. *Cookson v. Cookson*, just referred to, contained that feature; and it was conceded that, if there had

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been partnership debts, the creditors could have subjected the land to their payment. Where the land was not purchased for partnership uses, and there was no agreement making it partnership property, and yet it was paid for out of the funds of the partnership or taken in the payment of debts due to it, the question between the two classes of creditors would be one of construction as to the intent of the partners in making the purchase. It might be that such a purchase would be made as an investment of realized profits. If, for instance, the purchase-price should be charged to the separate accounts of the partners, that would be an indication that it was considered by them an application of divided profits. If, on the other hand, the income should be carried into the books of the copartnership, or if the land itself should be included in the periodical inventories of stock in trade, there would be an inference, more or less strong, that it had been agreed to hold the estate as partnership property. Where neither of these features exist, I am of opinion that, according to the doctrine of the English courts, the land, though paid for out of partnership funds, would retain its original character of real estate, and would be considered as belonging to the several partners according to the legal title as determined by the conveyance. But, in a leading case in the late Court of Chancery, decided in 1847, the land was considered as converted for the purpose of subjecting it to the debts of the copartnership, upon the single fact that it had been conveyed to the copartners in payment of a firm debt. Lands were conveyed to the partners, Naylor & Sumner, by a debtor of the firm, in satisfaction of the debt. On winding up the affairs of the concern, Naylor was obliged to pay out of his own means to the creditors about five thousand dollars beyond his ratable proportion of the debts, and for this balance he recovered a judgment against Sumner in the Superior Court; but, by mistake, the judgment was never regularly docketed, as the Chancellor held. Subsequently, a judgment was recovered against Sumner by another party for an individual debt, and then the premises were sold upon a decree of foreclosure of a mortgage

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older than either of the judgments, and the money was brought into court for distribution. Upon a reference, it was adjudged to belong to Naylor—one half of it as the owner of an undivided moiety of the premises, and the other half as the judgment-creditor of Sumner, the other tenant-in-common. On the hearing of exceptions to the report, a Vice-Chancellor confirmed it; and on an appeal to the Chancellor, he held that the distribution could not be sustained on the ground upon which it was placed by the Master, for he considered the imperfect docket wholly void. But he decided that, for the purpose of a liquidation of the copartnership affairs, the payment of its debts, and the division of the assets between the partners, the land was to be regarded as personal property; and he sustained the report on that single ground. The opinion is quite thorough, and it reviews all the cases on the subject, English and American; and the judgment appears to have been acquiesced in, as I do not find that it was brought before this court on appeal. It was not pretended that the land was purchased for, or that it was adapted to, the use of the firm in its business, or that there was any agreement that it should be considered as partnership property. Several of the cases referred to in support of the Chancellor's conclusion showed the additional fact that the land was purchased for partnership use, or that it had been agreed that it should be considered partnership property; but there being no such feature in the principal case, it is a direct authority for the position that it is enough that the purchase should have been made with partnership funds. (*Buchan v. Sumner*, 2 Barb. Ch., 165.)

In the present case, the finding of the referee is express to the effect that the three parcels of real estate were acquired "with copartnership effects in the collecting and receiving the debts due the said firm." It is also stated in it, that this land was a part of the copartnership property; but this should probably be considered as a legal conclusion, from the particular facts which are found. The referee also states that these parcels of land had always been inventoried and treated, and,

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at the time of the assignment, were held, as a part of the partnership effects and property. This, I think, would be sufficient to sustain his conclusion upon what I have considered the doctrine of the English courts. But I am in favor of placing the case upon the rule established in *Duchan v Sumner*, because it was a well-considered judgment of the highest equity court of original jurisdiction under the former system, and has been taken as the law of the State for the last fifteen years. It was not, moreover, a departure from any adjudged case in this State. If it does not conform to the current of English adjudications, it establishes, I think, a better practical rule. It is, essentially, a question as to the *onus probandi*. Where the price of land conveyed to the partners is paid by copartnership money or effects, or it is taken in satisfaction of a debt due the concern, the real estate becomes partnership property, or is individual property, according to the legal effect of the conveyance, as the intention of the purchasers shall appear to have been. It may be either the one or the other. *Prima facie*, I should say that, where the land was taken in payment of a debt, it might be considered, in equity, as property of the same class as that which was parted with in making the purchase. So much of the undisputed property of the partnership has been exchanged for the land: it may possibly have been thus invested in order to pay a dividend to the several partners, to whom the land is conveyed; but the stronger probability would always be, in such a case, that it was taken as an expedient for collecting a debt. A conclusion which is to be adopted in the place of precise proof, should always be in favor of the theory which is the most probable; and it is upon this rule that the burden of proof is usually adjusted.

If the real estate included in the joint assignment was liable to be applied, in the first instance, to the payment of partnership debts, it was not unlawful to include it in the assignment to a trustee for the purpose of satisfying these debts.

The other objection to the joint assignment depended upon questions of fact, which have been settled against the plain-

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tiffs, by the finding of the referee that it was executed in good faith and without fraud.

The report of the referee and the judgment of the Supreme Court condemn the separate assignment of George Caldwell as fraudulent and void, as against his creditors; but it is insisted on the part of the plaintiffs that the judgment is incomplete, because it does not contain a direction that Caldwell shall assign the property to a receiver. But I think that would not have been an appropriate direction under the circumstances of the case. The real estate embraced in that assignment had been mortgaged to the defendant Read; and that mortgage had been foreclosed, and the lands embraced therein, except the stone store, were purchased in by the mortgagee; and this stone store was subject to a prior mortgage to the commissioners of loans, upon the foreclosure of which it had been purchased by Read. Before these foreclosures had taken place, Mitchell, as assignee, had sold the equity of redemption. That sale was probably void, as the plaintiffs' counsel suggests, for having been made *pendente lite*; but this would not affect the title which was acquired under the foreclosure sales. The judgment declares the mortgage to Read free from fraud and valid. Whatever title, therefore, passed to Mitchell by the assignment, was extinguished by that foreclosure and sale, except as to the stone store; and Mitchell's title to that was cut off by the foreclosure of the mortgage to the commissioners of loans. Besides, the appropriate relief of the plaintiffs was granted to him. The assignment, which formed an impediment to their legal remedy, was declared null and void as against them; and they were free to enforce that remedy against the land, so far as the assignment was concerned. If the title, which the plaintiffs' debtors would otherwise have had, has been extinguished by the enforcement of other and valid incumbrances against it, that is a misfortune which they could not be relieved against.

It is also claimed by the plaintiffs' counsel that Mitchell should have been charged with some amount for the rents of the estate which passed under this assignment, from its exa-

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cution until the assignee's title was extinguished by the foreclosure. Assuming the assignment to be void, as the court has determined, I do not perceive how the plaintiffs, as judgment-creditors, would be entitled to the rent of the land until they had perfected their title to it by a sale on their execution, and had obtained a sheriff's deed. They had no title, and only a general lien. The debtor has made a fraudulent conveyance. The creditor had a right, if he chose, to sell on his execution, notwithstanding the conveyance; or he might, as he has done, bring an action to set aside, and have declared void, the impediment created by the conveyance. The result of success in such a suit is to uncover the land, so that he might not be embarrassed in case of his judgment against it. It is very plain that, until the commencement of the action, he had no lien, general or particular, against the rents and profits which had accrued, unless they existed in the hands of the debtor. If he had spent such rents for his own use, the plaintiff could not have recalled them. In point of fact, he had, by the assignment, and by the act of the assignee, in paying them over according to the provisions of that instrument, exercised a right which he possessed respecting them. If the plaintiff and the other creditors had affirmed the assignment, the trustee would have been compelled to account for these rents, according to its provisions; but the plaintiff, claiming in hostility to it, must treat the trustee as a stranger, whose only fault has been in suffering himself to be made an instrument, by means of which the debtor has been enabled to apply the rents towards the payment of other creditors. (*Wakeman v. Grover*, 4 Paige, 28; *Ames v. Blunt*, 5 id., 18; *Mills v. Argul*, 6 id., 577.) The moneys received since the commencement of the action seem to be only sufficient to pay the necessary expenses of taking care of and protecting the property; and there is no reason why the trustee should account for them.

The exception to the finding, by which the mortgage for \$8,275.10 was determined to be *bona fide*, does not raise any question of law. It is argued that it was necessarily fraudu-

Collumb v. Read.

lent, because the assignment of the mortgage, executed some six weeks afterwards, and which has been adjudged fraudulent and void, provided for any deficiency which might remain of the mortgage debt. But this by no means follows. The two instruments do not correspond in point of time or in respect to the parties to them. It would be strange if a debtor could prejudice an honest debt which he had contracted, or a valid security which he had executed, by including the debt in a fraudulent transfer of property which he should subsequently execute to a trustee for the payment of his debts. Nor is it, in law, conclusive evidence of fraud, that the debtor, on the same day, executed a fraudulent security to the same person. The real estate mortgage, and the chattel mortgage of the furniture, both executed to the defendant Read, bear the same date; and a debt of \$800, the existence and *bona fides* of which are affirmed by the report, were divided between the two securities, a part of the amount being included in each. We are not informed, by the findings of the referee, on what grounds the chattel mortgage was decided to be fraudulent. It may have been, that the remote period fixed for the payment of the debt mentioned in it, or that the want of possession in the mortgagee for so long a period, were the features which led to the condemnation of that instrument. All which we are informed is, that it was not pronounced fraudulent because the debt mentioned was not owing by the mortgagor to the mortgagee; for the existence of the debt is distinctly found. It was not unlawful to secure the other part of the debt of \$800 by the mortgage of the real estate, if that security was not objectionable for any other reason, and it is found to be *bona fide*, and not infected with fraud. I, by no means deny that these several securities, and those which were executed on the 17th of April following, were well calculated to excite suspicion as to the integrity of the transactions to which they relate. As evidence, they were well worthy of consideration; but I do not perceive that they raised an inference of fraud, which was not capable of being overcome by evidence of their intrinsic fairness and honesty.

It was for the referee and the Supreme Court, when sitting in review upon the facts, to determine upon the persuasive effect of the evidence.

A similar objection, of want of completeness, is taken to the judgment respecting the chattel mortgage, which was interposed in regard to that respecting the separate assignment of G. Caldwell. The defendant Read, as mortgagee, after the commencement of the action, caused the furniture to be sold on the mortgage, and became the purchaser for \$418.80; and afterwards gave it, by bill of sale, to his daughter, the wife of Caldwell the mortgagor, in whose possession it was at the time of the judgment. I do not see anything in these transactions, even had they occurred before suit brought, to charge the mortgagee with any amount of money. The property has not been destroyed, or placed beyond the reach of the plaintiffs' executors. What was undertaken to be done by virtue of the mortgage, after suit brought, was simply void. The title to it is now in the receiver, whose duty it is to take possession of and sell it. If he is hindered in doing so, he is entitled to the ordinary remedies of one having a special property in chattels, and, perhaps, to the summary interposition of the court against George Caldwell. He was in possession of the property when he made the fraudulent assignment; and what was subsequently done, to confer a colorable possession upon his wife, was void. We think there was no error in the Supreme Court, in the manner in which this part of the case was disposed of.

No rule of law was violated, in the disposition which was made of the costs. They were in the discretion of the Supreme Court, with which we do not interfere.

The judgment appealed from must be affirmed.

All the judges concurring,

Judgment affirmed.

Hopkins v. Nelson.

HOPKINS *et al.* v. NELSON.

A statement is sufficient to authorize the entry of judgment by confession, under section 383 of the Code, which sets forth that "the plaintiff has this day indorsed my notes, payable at bank for \$6,000 in all, for my accommodation, and to enable me to negotiate said notes," without any further description of the notes.

IN November, 1854, one Nelson confessed a judgment in favor of Benjamin Chamberlain, for \$6,000. The statement upon which it was founded is set forth in the following opinion. Execution upon this judgment having been levied upon the property of Nelson, Hopkins, who had obtained a subsequent judgment, moved to set aside the judgment in favor of Chamberlain. The court, at special term, held this statement defective, in not specifying the number, dates, amounts, and times when payable, of the notes. Upon appeal, the court, at general term in the eighth district, held the statement sufficient; and Hopkins appealed to this court.

John K. Porter, for the appellant.

A. G. Rice, for the respondent.

GOULD, J. A judgment, entered on confession, where the statement is imperfect, under the provisions of the Code, is not absolutely void; but is good as between the parties thereto. As to third persons, whose rights have attached by a judgment, or by purchase of, or lien on, property affected by the confessed and defective judgment, the latter judgment is not amendable, but, as to them, is voidable, and, on their moving to avoid it, is adjudged to be void, so far as they and their rights are concerned. On this point, the decision of the Supreme Court, so far as the appeal of the plaintiff Chamberlain was concerned, was correct.

The statement of the confession to Chamberlain is, that it is "for the purpose of securing the plaintiff against his liability

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arising from the facts hereinafter set forth, and does not exceed the amount of such liability. The said plaintiff has this day indorsed my notes, payable at bank, for six thousand dollars in all; which indorsements are made by said plaintiff for my accommodation, and to enable me to negotiate said notes; and this confession and judgment is given him to secure him against his liability as such indorser, and for no other purposes."

In regard to judgments confessed to secure indorsers and sureties, prior to the Code they were confessed by the same form, (of bond and warrant of attorney,) which was used in the case of absolute debt. And the Commissioners of the Code, holding the giving of a judgment to be a legitimate mode of securing indorsers and sureties, yet deemed it right that the record should state the truth, and show that the judgment was but security, and its binding effect but contingent; saying, in their report, "so that its (the judgment's) purpose or intent cannot be denied or concealed." To this end they provided that, in such cases, the confession must "state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same" contingent liability.

There can be no doubt that the confession before us fully meets the requirement of showing that it is for no debt, but for a contingent liability. It further shows that such contingent liability arises, not out of any contract as surety, (in the common use of the word,) but that, in fact, the plaintiff had that day become the accommodation indorser of the defendant, and that that fact constituted the liability against which the judgment was intended to protect the plaintiff, and that such indorsements were upon notes to the full amount for which the judgment was confessed.

The appellant claims that stating these facts is not a sufficient compliance with the Code (§ 333), and that the roll should show the date, time to run, amount, and place of payment, of each note so indorsed by the plaintiff. To judge by the examples given us by the appellant, such a statement would not be a ~~conclusion~~. But is it necessary, for the purposes of

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the section? The statement we have fully answers the purpose of showing the confession to be, not for money due, but for a contingent liability. It states the facts which show this, and "*the facts*" which certainly do "constitute" just such a liability. By the act of indorsing, the plaintiff became contingently liable. The maker of the note had the absolute power over it, and its indorsement; and by no legal power could the indorser undo his act, or obtain control of the note. The compliance with the section is literally complete. Is it so in substance?

To ascertain this, the object of the section is to be considered. And that is, to have a compliance which, while it allows abundant means of giving such security, shall afford all reasonable protection against a fraudulent use of this form.

If this statement be true; if the defendant be not guilty of perjury; there is no fraud in the confession. How is there to be any fraud in enforcing it? As it states on its face that it is for a contingent liability, when the plaintiff attempts to enforce it, any judgment-creditor, &c., can put the plaintiff (by motion to set aside his execution), to the proof that his contingent liability has become absolute, and he then may be compelled to show, not concisely, but in detail, the particulars which make up his gross amount. Or, as has been done in this case, a subsequent judgment-creditor, being, by the face of the record, notified that it is open to such a contingency, may, by motion, attempt to set it aside as actually fraudulent. And if (as it has been proved in the court below), there was no fraud in fact, there seems no need of construing the section so as to give an undue advantage to a junior judgment-creditor, instead of merely affording him that adequate protection which he has by so construing the section as to hold this statement on confession good.

The order of the general term of the Supreme Court should be affirmed.

SELDEN, Ch. J., was absent; all the other judges concurring,

Judgment affirmed.

CARTWRIGHT et al. v. WILMERDING et al.

The Factors' Act (ch. 179 of 1830) protects one who makes advances upon the faith of the documentary evidence of title furnished by a warehouse-keeper's receipt of imported goods procured by a factor by his being intrusted with an invoice of the goods, although the invoice showed that the goods belonged to the shipper.

The factor's making a warehouse entry at the custom-house, taking a warehouseman's receipt and transferring it with authority to make the withdrawal entry at the custom-house, enable the pledgee to reduce the property to his possession as effectually as a custom-house permit, and are equivalent thereto as a security under the act.

The pledgee, acting upon the faith of documents which, according to the course of business, were sufficient to transfer the property in goods warehoused subject to duties, and which contain nothing to indicate any title out of the pledgor, is not bound to inspect the warehousing entry which is retained at the custom-house, and, in the course of business, would not be in possession of the owner of goods which he had himself imported.

It is unnecessary that the principal should have intrusted his factor with the identical evidence of title on the faith of which he procures a loan. Intrusting him with the primary document is equivalent to intrusting him with all others which, in the ordinary usage of trade, grow out of it. That the pledge, and the delivery of the documentary muniments thereof, are separated by some interval of time, is no otherwise important than as it may raise a suspicion that the giving security was an afterthought. Goods in warehouse, subject to be withdrawn at pleasure by a factor, on discharging the lien of government for duties, may be regarded as in his possession, so as to support a pledge thereof made by him, independent of the provisions of the act in regard to documentary evidences of title.

APPEAL from the Superior Court of the city of New York. Action by the plaintiffs, who were English manufacturers, under the firm of Cartwright & Warners, to avoid two pledges of merchandise made by Acker & Harris to the defendants. The trial was by the court, without jury, and the judge found these facts:

The plaintiffs, between January and August, 1857, made five shipments of hosiery, consigned to Acker & Harris, who were merchants in New York, and for two or three years had

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been their agents for the sale of their goods, to be sold for and on account of the plaintiffs. Invoices were sent to Acker & Harris with each consignment, to which were appended affidavits, stating that Cartwright & Warners were owners, which were presented to and left with the collector by Acker & Harris at the times when they entered the goods at the customhouse. Acker & Harris were not in advance for Cartwright & Warners; and Cartwright & Warners did not intend that the goods should or would be warehoused, but that Acker & Harris should pay the duties at once. Instead, however, of paying the duties and taking the goods from the vessels, Acker & Harris entered the goods for warehousing, pursuant to the act of March 28, 1854. (10 U. S. Stat. at Large, 270.) The entries for warehousing stated the goods to have been imported by Acker & Harris. The goods were deposited in the bonded warehouses designated by Acker & Harris, and thereupon they received from the proprietors of the warehouses, respectively, receipts describing the numbers and marks of the cases or packages containing the merchandise, and stating them to have been "received in bond, for account of Messrs. Acker & Harris."

The course of business in respect to warehoused imports is as follows: The bonded warehouses constituted by the act and the treasury regulations are required to be used solely for this purpose, and for unclaimed and seized goods in the custody of the collector. The buildings belong to individuals, but by said regulations they are placed in charge of an officer of the customs, who, together with the proprietor of the warehouse, has, under the act of Congress, "the joint custody" of the stored merchandise. (Act, § 1.) A deputy collector, as the storekeeper of the port, is the storekeeper of the goods in all those warehouses, and the officer of the customs in charge of each particular warehouse is designated an assistant storekeeper. When goods which have been entered for warehousing are intended to be withdrawn, the regulations require that a withdrawal entry be made by the party who made the first entry, or some person authorized by him. The party

Cartwright & Wilmerding.

making this withdrawal entry must sign it; and thereupon, as soon as the duties are paid, the collector will issue a permit for delivery to the person making such withdrawal entry, and the goods cannot be taken out of the bonded warehouse without such permit. According to the usage and practice at the New York custom-house, the written authority to make the withdrawal entry, thus required from the party who makes the first or warehouse entry, may be put on the face or on the back of the original withdrawal entry. A practice existed in 1857, ^{warehouse,} among the proprietors of the bonded warehouses in the city of New York, for the purpose of facilitating sales and transfers of goods "in bond," as hereinafter stated: The warehouseman keeps a book in which he enters all the goods received, and, if requested by the importer, he issues a certificate acknowledging the receipt of the goods "for the account of" the importer, naming him. This certificate is returned to the warehouseman before a delivery of the goods. And whenever the certificate is returned by any one to whom it has been transferred by written indorsement, the warehouseman, if requested, enters on his book that the goods are so transferred. Such changes are made by the warehouseman, from time to time, as often as required by the importer or his assigns. On "sales in bond," the seller writes the authority to enter for withdrawal on the back or the face of the original warehousing entry, or, taking a printed blank form of a withdrawal entry, he fills it up with the proper marks, &c., so as to distinguish the goods, and also fills up the printed blank authorization to make the withdrawal entry at the foot, and signs the latter. The books thus kept for the convenience of trade by the warehousemen are not the official books or accounts in which the receipt and delivery of goods in a bonded warehouse are entered on behalf of the Government by the custom-house officer in charge. The certificates are issued without referring to the entries at the custom-house; and the practice of issuing them was devised by the warehousemen, according to their own views of fitness, without any form being prescribed by the Government. These warehousemen's certificates are not

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required to be produced at the custom-house, and have no authority as it regards the collector's action.

The merchandise in question was never in the possession of Acker & Harris, otherwise than as it was, in warehouse, practically subject to their control under the course of business just stated.

In July, 1857, Acker & Harris made an arrangement with the defendants, who were auctioneers, under the firm of Wilmerdings & Mount, by which the latter agreed to make, and subsequently did make, advances upon the pledge of these goods, in anticipation of the sale of them at auction. The advances were in the promissory notes of Wilmerdings & Mount, given by them to Acker & Harris, with an agreement that, unless they should be put in funds, by the sale of the goods or otherwise, to meet the notes at maturity, they should take and sell the goods to reimburse themselves, with their commissions. The notes thus given were paid by the defendants. It was expressly found that the advances were made by Wilmerdings & Mount in good faith, actually believing and on the faith that the merchandise was owned by Acker & Harris, and without any notice or suspicion that any other persons had any interest in such goods. The first advance was as follows: Eighty-two cases were, on 18th July, 1857, left in bonded warehouse. Seven other cases were at the appraiser's office, undergoing examination as to the dutiable value. On said 18th of July, 1857, Acker & Harris delivered these parcels of merchandise to Wilmerdings & Mount, for sale at auction, and obtained thereon an advance of \$45,000. The precise mode of this delivery was as follows: Before or at the moment of the advance, Acker & Harris handed to Wilmerdings & Mount the warehouseman's certificate for each parcel, in the form before described, with this indorsement: "*Deliver to Wilmerdings & Mount, or order. Acker & Harris.*" At the same time Acker & Harris agreed to give to Wilmerdings & Mount like certificates for the seven cases remaining at the appraiser's office, as soon as they should be examined and sent to the warehouses. The certificates handed to Wilmerdings &

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Mount were sent immediately to the warehouses, and the usual entries of the transfers were made by the warehousemen in their respective books. A few days afterwards, say on the 27th of July, 1857, and agreeably to the engagement of Acker & Harris at the time of the advance, a precisely similar handing in of indorsed certificates and transfers thereof took place in respect to the said seven cases which had been at the appraiser's office. At the moment when the advance was made, Acker & Harris agreed to go immediately to the custom-house and indorse over the entries to Wilmerdings & Mount. This was not done immediately. The second advance of \$50,000 was conducted in the same manner, except that the indorsement of "transfer to the order of Wilmerdings & Mount" was not made by Acker & Harris upon the warehouseman's certificates at the very moment of the advance. It was inadvertently omitted until three or four days afterwards. Wilmerdings & Mount, with one exception, took out new certificates, in their own favor, from each of the warehousemen, shortly after they received the original certificate from Acker & Harris. The only papers exhibited to Wilmerdings & Mount before the advances, besides the warehouse certificates, were memorandum invoices, stating the name of each vessel and against that the number of pounds sterling of the consignment of that vessel, without other particulars. Neither did Wilmerdings & Mount see the goods. After the advances, and on the 22d of August, 1857, learning that Acker & Harris had not, as agreed, indorsed over the entries at the custom-house, Wilmerdings & Mount requested Acker & Harris to do so. Accordingly, on that day, Acker & Harris went to the custom-house and wrote upon each of the warehouse entries a certificate, in the regular form, authorizing Wilmerdings & Mount to withdraw the goods. Wilmerdings & Mount were not present at the making of this certificate. By the treasury regulations the archives of the custom-house are all secret, except that, on special application in writing to the collector, he, in his discretion, may give "the particular information or data requested."

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The judge held that the plaintiffs were the true owners of the goods, and that the defendants had no lien or valid claim to them. The judgment entered upon his direction having been affirmed at general term, the defendants appealed to this court.

Charles O'Connor, for the appellants.

C. Van Santvoord, for the respondents.

GOULD, J. This case involves the construction of the statute of this State commonly called the *factors' act*, which is an act "relative to principals, factors and agents," passed April 16th, 1830; and is to be found in the Laws of 1830, page 208, and in 3 Revised Statutes, 5th edition, page 76. The act was intended to modify and make certain, (in its practical application to the current transactions of trade and commerce,) the general common-law rule, that, where one of two innocent persons must suffer loss from the act of a third person, such loss shall be borne by him, who has placed the third person in the position which enabled him to do the act causing the loss.

The third section of that act is the most important one; indeed, the only important one, except that it is itself to be construed in part by the rest of the act. But for the purposes of the case before us, this third section is the only one to be referred to; and, in view of some decisions that have been had upon it, we shall need to examine but a part of that section. It is this: "Every factor or other agent entrusted with the possession of any bill of lading, custom-house permit, or warehouse-keeper's receipt for the delivery of *any such* merchandise; and every such factor or agent, not having the documentary evidence of title, who shall be entrusted with the *possession of any merchandise* for the purpose of sale, or as a security for any advances to be made or obtained thereon; shall be deemed the true owner thereof, *so far as to give validity to any contract, made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise,*

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for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof."

The first section of the act speaks of any person in whose name "any merchandise shall be shipped," and provides for liens in favor of the consignee of "*such shipment*." So that the third section, in speaking of the possession of "any bill of lading, custom-house permit, or warehouse-keeper's receipt for the delivery of any *such* merchandise," plainly and necessarily refers to such merchandise as has been named before; that is, merchandise which, in the course of trade, has been so shipped that, prior to its coming into the possession, (actual or legal,) of the consignee, certain "*documentary evidence of title*" does, by the established usages of trade, (which make and which are the law merchant,) give the entire and exclusive control of the delivery of the property to the person holding such documentary evidence. In contrast to this, (and making the construction more clear,) the next clause of the third section speaks of a different subject—of merchandise which is so situated as not to require such documentary evidence of title, but is in the possession of the factor; and then it says, (not any such merchandise,) but "*any merchandise*," whether ever shipped, or ever connected with any bill of lading, &c., or not; it says, "*any person, who shall be intrusted with the possession of any merchandise for the purpose of sale,*" &c., shall be deemed the owner, &c. Thus we have two distinct classes of cases; one where a factor is intrusted with complete documentary evidence of title; the other where he is intrusted with the possession, which is, *per se*, evidence of title; and to avoid the evil of making this possession evidence of title in all cases, this section provides that the factor shall be intrusted with the possession "for the purpose of sale, or as a security for advances to be made, or obtained thereon;" while the sixth section guards expressly against a sale, &c., by any one who is a mere bailee "for transportation or storage only;" providing that no such bailee ("common carrier, warehouse-keeper, or other person,") shall sell or hypothecate the merchandise so committed

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(intrusted) to him. And, in passing, we may note that this use of the word "hypothecate" shows that the statute has been properly construed, (in the decisions of our courts), as providing for a pledge of the merchandise, either by the holder of the documentary evidence, or by the possessor.

In the construction of this third section, it is claimed that the documentary evidence (as well as the possession,) must be intrusted "for the purpose of sale," &c. This is probably so, although the English statute, (6 Geo. IV, noted *post*,) does not require anything as to the purpose for which the documents shall be intrusted. But it is not necessary for the decision of this case that we decide that point; since there is no doubt that all the control, and all the evidence of title, which Acker & Harris had, they had "for the purpose of sale;" which includes (under the statute, though not at common law), the "disposition" of any title less than the whole. Being entrusted for the purpose of absolute disposition, and so considered the true owners, they could, of course, make a conditional one, even though the goods were not intrusted to them for that purpose.

The statute 6 George IV, chapter 94, section 2, differs decidedly from ours, as it says nothing of a factor in possession; being confined to those who have documentary evidence of title. Yet it is quite probable that the draughtsman of our act referred to this English statute for some of his terms; since, while using one of our technical terms (not used in the English act), "custom-house permit," he adds, "warehouse-keeper's receipt," a term not then known in our commercial vocabulary, as we then had no bonding or warehousing system. It was probably used in expectation of such a system, which had been called for by our importers. At any rate, if our previous construction of the words "*such merchandise*" be correct, this use of "warehouse-keeper's receipts" cannot refer to a private warehouse-man, who receives goods directly from the owner; although the sixth section of our act does use the word "warehouse-keeper" in that sense. The phrase in the third section, must have reference to a warehouse-keeper of shipped or

imported goods; some one connected with, if not in, a public employment.

The English statute, and our own, were manifestly passed for the purpose of increasing the facilities of trade, by legalizing and explaining the cases in which a party could sell, or pledge, property at sea, in the ship at dock, or lying in the warehouse subject to the payment of duties. Historically, the necessities of trade and the customs of merchants had, in both countries, anticipated the statutes. And the benefits of the statutes and the custom are too evident, and too great to allow us to narrow the construction of the law. And there is no sound principle which would oppose a liberal view, tending to enlarge the facilities of transfer; since these acts but follow out the general rule, that every man is bound to take care not to select an agent, who will do acts to injure other persons.

To proceed with the case: To which of the two classes of factors above specified, did Acker & Harris belong? They had been "intrusted" with the bill of lading; and it had performed its office by securing to them an entry at the custom-house—a regular, legal, customary entry, known as a warehousing entry; by virtue of which they, and the person whom they might authorize—and no other—could, upon paying the duties, take delivery of the goods. Further, according to the custom of trade, they had, upon and as a consequence of such warehousing entry, procured a warehouse-keeper's receipt that he held the goods "*for their account*," practically subject to their order so far as he was concerned, and, by law, absolutely at their risk. To be entitled to enforce that receipt, they needed to make a withdrawal entry at the custom-house; (which withdrawal entry could by law be made only by the party in whose name the merchandise was warehoused, or by some person duly authorized for the purpose by him;) then pay the duties, and procure the "custom-house permit."

The authority to a third person to make the withdrawal entry, was to be a simple writing: "I authorize A. B. to withdraw from warehouse the goods described in this entry;" and might be on the original entry, or on the withdrawal entry,

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The warehousing permit, (issued on the surrender of the bill of lading and the making of the warehousing entry,) would regularly be followed by the withdrawal entry; and the withdrawal entry, (or the exclusive authority to make it,) with the warehouse-keeper's receipt, furnished to "the holder the *exclusive means and power of obtaining the possession of the property meant to be pledged, and would be a bar to any disposition of it,*" to any but this holder; and thus these documents are in just the same relation to the property, and exercise precisely the same control over it, as would a "custom-house permit;" and it is not easy to see why the authority to make the withdrawal entry, coupled with the warehouse-keeper's receipt, is not as "effectual security for any advance made upon its faith," as the custom-house permit would be. (Judge DUER's opinion in *Bonito v. Mosquera*, 2 Bosw., 441.) Certainly they come within the ruling (2 Bosw., 444), that they must be "such documents as will enable the pledgee, with certainty at the proper time, to reduce the goods into his own possession, and in the meantime prevent any other person from legally acquiring a hostile possession;" and it can hardly be material that, to obtain this possession, the pledgee must pay the duties. That act, also, is exclusively within his own power.

Since the passage of the statute, there is no legal need of saying that any of the documents named in the acts give the holder constructive possession of the property; for the statute, while it calls them "documentary evidence of title," makes them equal, in validity, to possession, and leaves us to call them what they are, with the same legal effect as if we gave to the facts the former designation, which is descriptive of their legal effect. (In brief, the effect of the statute seems to be, that he who has such documentary evidence of title, as gives him the exclusive control of the possession, shall be held the true owner of the property for certain purposes, provided the true owner has intrusted him with such evidence, for the purpose of disposing of the property. A factor so situated can sell, or pledge the whole or any part of the property, or give upon it any lien or security for advances, or, in short, treat it as his

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own. Intrusted with the disposing control, he can exercise that control; and if he misappropriates the property or its avails, his principal must suffer—not the person who has dealt with the factor “on the faith” of the position, in which the principal has placed him.

If the former conclusions, as to the control which Acker & Harris had, be correct, they would seem to be within this class of the factors named by the statute; that is, holders of such documentary evidence as gave them the exclusive control of the possession of the goods.

• Were they intrusted with this evidence, by the plaintiffs? It would seem a very narrow construction of the act, to hold that they must have received from the plaintiffs the identical document which, at the time of the pledge, constituted the evidence of their title. If so, the instant they surrendered the bill of lading, even on paying the duties and taking a “custom-house permit,” they could not have sold the goods without going through the form of themselves receiving the goods; for, literally, they did not receive the custom-house permit from the hands of the plaintiffs: the plaintiffs did not actually, literally, intrust that to them. And can we hold any different rule in regard to any one of the formal documents which, in the regular course of lawful trade, are obtained, or obtainable, at the custom-house, for controlling the possession of the goods? Intrusting with the primary documents, out of which all the others grow, in the usual course of trade, must be held an intrusting with all those others.

In holding these views, it is by no means necessary for us to interfere with the decisions under the English statute, cited to us as showing the strictness with which that statute has been held to mean, that the identical document must have been intrusted by the owner to the factor. The scope of that act was entirely different from that of ours. It, as already noted, said nothing of a factor's actual possession of goods; but left that, as at common law, not sufficient to authorize a pledge, unless the goods were left with him for that purpose. By confining itself to the possession of documentary evidence of

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title, it showed an intent to depart as little as possible, (consistently with the wants of trade,) from the strict common-law rule. And the English courts, in construing such a statute strictly, upon this point of intrusting the document to the factor, but acted according to the general intent of their statute. By such strict construction, they retained for the owner the power to insert, in the very document he intrusted, just such safeguards against a misuse of the authority, as he saw fit; which safeguards would not accompany a secondary or substituted document, procured by the factor himself, by virtue of his having the original document. Upon this principle of construction were based, and correctly based, the cases cited to us. (6 Mees. & Welsb., 572; 9 id., 647; *S. C.*, in H. of L., 14; id., 665.)

But our statute departed entirely from the common law; and, by making a factor's possession such evidence of ownership as to enable him to do all acts, which the true owner might, manifested a totally different intent from that of the English act. Substantially, it left an owner to use his precautions when he selected his factor; thereafter leaving him to be responsible for the acts of his agent, and protecting a *bona fide* third person in any transaction fairly effected with the apparent owner. And, for the benefit of trade, the statute said that the delays incident to following up the line of title, and the extent of authority, might be dispensed with, except so far as the statute itself retained them, that is, as to bailees receiving goods for carriage.

That the course of trade really called for such an act as ours is, upon this construction, is made clear by the course of English legislation on the same subject. Immediately upon the decisions in *Meeson & Welsby* (above cited), Parliament passed an act (5 and 6 Vic., c. 39), giving the same effect to a factor's actual possession as our act gives. And in the same spirit, and as it were for the very purpose of preventing the force of the prior decisions on the point of "*intrusting*" documents, &c., a section of that act provides that an agent possessed of any of the documents of title mentioned in the act, "whether

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derived *immediately* from the owner of such goods, or *obtained by reason of such agent's having been intrusted with the possession of the goods* represented by such documents of title as aforesaid, or of *any other* documents of title thereto, shall be deemed and taken to have been intrusted with the possession of the goods represented by such documents of title as aforesaid; and all contracts pledging, or giving a lien upon, such document of title as aforesaid, shall be deemed and taken to be, respectively, pledges of, and liens upon, the goods to which the same relates," &c.; "and an agent, in possession as aforesaid of such goods or documents, *shall be taken*, for the purposes of this act, to have been *intrusted* therewith by the owner thereof, unless the contrary can be shown in evidence." (9 Mees. & Welsb., 650, note.) This act not only comes up to ours, but overrules (by the legislature) the decisions, then seen to be inconsistent with the fundamental principle of this new act. Of necessity, those decisions have no force, under our act.

Three points remain to be considered: 1. Did the defendants make their advances "upon the faith" of the documentary evidence which the factors had? 2. Did they receive the evidence at the time of making the advances? 3. Had they knowledge, either that the factors were not the owners, or of facts from which the law charges them with notice of the true ownership?

As to the first of these points: The finding of fact is express, that the defendants made the advances in good faith, and "on the faith that the goods in question were owned by Acker & Harris; and on the security" of the pledge of those goods, in the manner stated.

That the second point ought to be a serious one; that a person, by the act made, *pro hac vice*, "the true owner" of the goods, cannot pledge them, without an instantaneously concurrent delivery of the bill of lading, custom-house permit, or warehouse-keeper's receipt; that he cannot receive the money on one day, and complete the contract of pledge on the next; seems a very strange position, even if there be English decisions of such a purport. To say, in such a case, that the

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advance is made on the faith of the promise to pledge, and not on the faith of the pledge, is a nicety of refining far too nice for the ordinary, common-sense, dealings of business men. If the time between the two acts, (long or short,) be such as to throw doubt on the transaction; such as, with connecting circumstances, to excite a suspicion that the advance was really a loan without security; and that pledging the goods was an afterthought; then the transaction is not within the protection of the statute. But all these are matters of fact, to be decided upon the evidence. It surely will not do to hold, as a rule of law, that a man, on receiving the money, cannot go around the corner to sign an order for the delivery of goods without changing the nature of his contract, and depriving the delivery of its agreed character of a pledge. In the case before us, the facts are found that, (notwithstanding the lapse of time before the authority was executed at the custom-house in favor of the defendants,) the advances were made "on the faith thereof," as required by the statute; and not on the faith of what has been called "the *executory promise to pledge*." Yet even on this question of time, the defendants knew of no delay. Acker & Harris were to make the authority to withdraw the goods directly to the defendants; and it was to be done at once at the custom-house: the defendants supposed it done.

The third point: Having, or being chargeable with, notice of the true ownership, is an element of the English statute, expressly; and it has correctly been held to be implied in ours. It is a condition, upon which the validity of the pledge or sale depends, that the person taking the pledge, &c., shall not have, either in fact or in law, any such notice. The case of *Stevens v. Wilson* (3 Denio, 472), and that of *Covell v. Hill* (2 Seld., 374), turned expressly on this point. In both, the pledgee had actual notice that the pledgor was not the owner. The case of *Stevens v. Wilson* did not profess to decide any other point; and that of *Covell v. Hill*, though discussing some points connected with this of notice, decides no other point under this statute.

By the finding, that the advances of the defendants were made "in good faith," their having any notice, in fact, of the true ownership of the goods, is expressly negatived. Were there circumstances connected with the transaction which charge them, in law, with such notice?

So far as the warehouse-keeper's receipt is concerned, certainly not. So far as the authority to them to make the withdrawal entry is concerned, they did not see it made; but trusted to Acker & Harris to do it at once, as they agreed to do. Were they bound to look up this warehousing entry, and see their authority duly executed? What were those papers, and where? This withdrawal entry, and the authority to the defendants to make it, are no papers that ever come to the possession of either the factor, or the purchaser (or pledgee) from him. Such papers are never in the possession of the actual owner when he imports his own goods, and warehouses them. They are custom-house papers; there retained, and "intrusted" to no one. The warehousing permit we have not in evidence. It is issued to the inspector of the port, requiring him to send to a specified bonded warehouse the particular goods; and the deputy inspector in charge of the bonded warehouse gives a receipt therefor to the inspector on board the vessel. (2 Bosw., 442.) This, of course, requires the goods to be stored for account of some one; and it must be the person for whose account the warehouse-keeper's receipt says they are stored; as he would not receive goods for account of one person, and give a receipt for them for account of another.

This warehousing permit is one of the series of papers, which are intrusted to the factor; and on surrendering it, and getting the goods sent to a warehouse, the only documentary evidence of which he has possession is the receipt of the warehouse-keeper, until he gets the final "custom-house permit," on signing the withdrawal entry and paying the duties. And, by the custom of trade, he may transfer the warehouse-keeper's receipt, by mere written order, to any one; thus transferring all the documentary evidence he has. And there-

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after, even his written authority at the custom-house, in favor of a different person, would be of no avail. The warehouse-keeper would not surrender the goods, save on the return of his own receipt. It would thus seem that nothing, that the defendants were bound to examine, gave them any notice of the true title; and if this be so, they are entitled to judgment, reversing that of the Superior Court.

We may say, further, that in thus treating the case, as depending on the possession of the documentary evidence of title, we have viewed it in the light most favorable to the plaintiffs. For if the goods were, in law, in the possession of Acker & Harris (being confessedly so "for the purpose of sale," if so at all), there can be no doubt of the defendant's right to take them in pledge, or of the fact that they, having taken them in pledge, had as much possession as Acker & Harris had.

Had, then, Acker & Harris the possession in law of the goods? Certainly, unless it were in some one else. And for the purpose of determining this point, we can take judicial notice of the well-known course of trade, by which goods in bond are extensively dealt in, at their ports of importation. As if to afford facilities for this very course of trade, the law allows goods so to remain, with duties unpaid, for three years; and officers of the customs practically and habitually recognize all sorts of transfers from importers, and consignees, and from the different subsequent holders of transfers. In short, they are, subject to the lien for duties, dealt with precisely as if stored in a private warehouse. The custody which the officers of the customs have thereof cannot, in judgment of law, be deemed a possession of the goods. (22 N. Y., 368.) It is rather a qualification of the possession, which is vested in the keeper of the bonded warehouse, or in the consignee under whose permit they were placed there; and is a mere restraint upon removal, (not interfering with the right of possession,) which the security for payment of duties requires to be vested in the government, while the possession is considered to be in the person who had them placed there; or in the owner of

the warehouse, who is as much the agent of this person as he is (in a certain sense,) the agent of the government. The *transitus* is ended when the goods are so warehoused. After that, the carrier has certainly nothing to do with the goods.

In the case of *Mottram v. Heyer* (5 Denio, 632), it is held that, "where goods are placed in the public store, under the warehousing system, (either in this country or in England,) after a perfect entry of them for that purpose, they are to be considered as having come to the possession of the vendee, at the place where he intends they shall remain, until he gives further order for their disposal; and the law recognizes his right to sell or dispose of them as he pleases, subject only to the custody of the officers of the revenue for the security of the payment of the duties, &c. And in such a case the right of stoppage *in transitu* should be considered at an end the moment the goods are thus deposited, after a perfect entry for that purpose has been made." The opinion then cites a case (*Strachan v. Trustees of Knox & Co.*), referred to in Brown on Sales, 536, where goods were imported and deposited by the consignee in a bonded warehouse, under the provisions of the statute 48 George III, chapter 182—(the statute which commenced the warehousing system of England)—in which case the court decided the *transitus* was ended. These cases would sustain the position that the goods had come to the possession of Acker & Harris, and would protect the defendants under the second branch of our factor's act.

Except for this statute, there could seem to be no doubt that, at the time of making the pledge, Acker & Harris were in the legal possession of the goods, subject to the government's lien. And, under the statute, there seems no doubt that they were then in possession either of the goods themselves, or of a document of title mentioned in the act, viz., a warehouse-keeper's receipt; and whichever they had, they were intrusted with it by the plaintiffs. The name of a paper, which is evidence of title (as in this case, "warehouse-keeper's receipt"), is of no moment, provided it be a paper which, by the course

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of trade, has the requisite character and force to satisfy the statute.

In either view, the judgment of the Superior Court should be reversed.

DENIO, DAVIES, SUTHERLAND, ALLEN and SMITH, Ja., concurring,

Judgment reversed, and new trial ordered.

STURTEVANT v. ORSER et al.

The vendee of goods which had come to his possession, ascertaining his insolvency, deposited them in warehouse subject to the order of the vendor, and notified him thereof by letter: before the vendor had signified his assent, the goods were attached by another creditor. *Held*, that the title of the vendor prevailed.

The delivery to the warehouseman was a rescission of the contract of sale by the vendee, and the subsequent assent of the vendor relates to the time of such delivery: *Per SMITH, J.*

An actual assent to the rescission by the vendor's agent is to be assumed in support of the judgment, upon a statement of facts in harmony with such actual assent, and the absence of any facts tending to repel such presumption: *Per DENIO, J.*

APPEAL from the Supreme Court. Action to recover a quantity of oil sold by the plaintiff to one Wing and delivered on board his vessel at New Bedford for transportation to New York for sale. Before the arrival of the oil, Wing became insolvent, and determined to return the oil to the plaintiff. On its arrival in New York, he directed it stored for the plaintiff with the defendant Kelly, and it was so stored. After this, on the 9th of July, he wrote the plaintiff what he had done, and that it was impossible for him longer to go on with his business and meet his payments, and saying that, immediately on finding that he must stop, he stored the oil bought of the plaintiff, subject to his order on paying charges and freight. This letter was posted July 9, and received by the plaintiff's

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clerk the same evening, the plaintiff being absent. The plaintiff's clerk immediately went to the residence of Wing, at Falmouth, Massachusetts, to learn where the oil was stored, found him the next day, July 10, and, upon ascertaining where the oil was, telegraphed to an agent in New York to take charge of it for the plaintiff. This telegram was sent him on the 11th of July. On the 10th of July, and before the receipt of the telegram by the plaintiff's agent, the oil was attached by a creditor of Wing. The plaintiff by his agent demanded the oil, and offered to pay charges and freight, but the warehouseman refused to deliver it, and this action was therefore commenced. The cause was tried at a Circuit Court in New York, and a verdict directed for the plaintiff for the value of the oil, \$1,145, subject to the opinion of the court at general term. The court at general term rendered judgment for the plaintiff, and found a statement of facts which is annexed to the record, and finding, as a conclusion of law, that the debtor Wing had no property in the oil at the time the attachment was served. From which judgment the defendants appealed to this court.

W. Bliss, for the appellants.

E. Terry, for the respondent.

SMITH, J. The delivery of the oil on board the vendee's ship at New Bedford was unquestionably a delivery to Wing, and vested the property in him. The property, it is true, was to be transported to New York for sale, but it was to be transported by the vendee himself, who could have changed its destination or sold it absolutely on shipboard. After such delivery it was not subject to stoppage *in transitu*, for it was not in the hands of a carrier or middleman. (*Inglis v. Usherwood*, 1 East., 515; *Turner v. Trustees of Liverpool Docks*, 6 Eng. Law and Eq., 515; *Ogle v. Atkinson*, 5 Taunt., 759.)

But if this were not so, the vendee could not exercise the right of stoppage *in transitu*, and the vendor made no attempt to do so. (Story on Cont., § 816.) The plaintiff's right to

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recover the oil must, therefore, be put upon other grounds to be sustained.

The case is quite parallel to that of *Atkins v. Barwick* (1 Strange, 165). In that case the defendants were mercers, living in London; and Cripps & Co., the assignors of the plaintiff, were traders at Penoyer, in Cornwall. On the 7th of April, 1715, the defendants, upon the order of Cripps & Co., sent them the goods in controversy, and gave them credit on their books for the amount. On the 18th of May, Cripps & Co., without the knowledge of the defendants, deposited the goods with a third person for the use of the defendants. On the 6th of June, Cripps & Co. wrote a letter to the defendants, stating that their affairs were in a bad condition, and that, for that reason, they thought it not reasonable that the last goods should go to other creditors; and that they had, therefore, not entered them in their books, but left them with a Mr. Penhallow, who had orders to deliver them to the defendants. On June 9th, a commission of bankruptcy was issued against Cripps & Co., and their effects assigned to the plaintiffs. The letter of Cripps & Co. to the defendants was not received by them till the 18th of June, which was the first notice they had of the delivery to Penhallow; and they immediately signified their consent to take the goods again.

This case, in all its essential particulars, is like the present case. The goods, as in this case, were delivered to, and the title vested in, the vendee; they were deposited with a third person by the vendee for the use of the vendor before the rights of creditors attached, and written notice of such deposit and of the failure of the vendee given to the vendor, and the goods actually attached before the vendor attempted to reclaim them.

In the decision of the case of *Atkins v. Barwick*, the chief justice held that "the delivery to Penhallow to the use of the defendants before the act of bankruptcy, and grounded on a good consideration, transferred the absolute property to them." FORTESCUE, J., said, that payment in satisfaction of the debt was a good consideration, and "we will intend an acceptance

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till the contrary appears." EYRE, J., said: "The precedent debt is a sufficient consideration, and it vests before notice [the title, he means]; for it being to his benefit, a disagreement shall not be presumed."

I have quoted this case thus fully because it is a leading one, and, if good law, is quite conclusive of the case now under consideration. This case of *Atkins v. Barwick* has been much discussed and much questioned, but not in any case overruled. In *Harmon v. Fisher* (1 Cowp., 125), Lord MANSFIELD said of it, that, "with respect to the case of *Atkins v. Barwick*, the judgment seemed right, but the reasons wrong." In *Neate v. Ball* (2 East, 117), Lord KENYON discussed it, and said that Lord MANSFIELD had extracted the true ground on which that judgment, if it did not proceed, ought to have proceeded; namely, that the trader, finding himself in failing circumstances, very honestly did not accept the goods, but returned them. But this distinction is obviously unsound and untenable. The bankrupt had the goods in possession for some time. They were sent him the 7th of April, and were in his possession, and sent by him for deposit with the third person on the 18th of May, more than forty days after being delivered to the vendee, or to the carrier for him; and were in his actual possession when so deposited. The title to them had absolutely vested before such deposit. They were not intercepted by the way, or the order of purchase countermanded before the actual receipt of the goods. But Lord KENYON, and the whole Court of King's Bench, did recognize the case of *Atkins v. Barwick* as sound law in *Salts v. Field* (5 Term, 211). Speaking of the case under consideration, Lord KENYON there said: "I cannot distinguish this case from *Atkins v. Barwick* on principle; for in that case there had been a delivery of the goods by the seller, with the concurrence of all the parties interested. But the agreement of the parties to rescind that contract put an end to the sale, as if it had never taken place." ASHHURST, J., said: "The case in *Strange* applies to the present case." BULLER, J., said: "The principle on which the case of *Atkins v. Barwick* was

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decided governs this." In *Smith v. Field* (5 Term, 402), the same court again affirmed the case of *Atkins v. Barwick*, and recognized it as sound law. The case has also been questioned in our courts. In *Berly v. Taylor* (5 Hill, 581), Judge BRONSON discusses it, and, after referring to the various cases, says of it, that, "although it seems never to have been overruled, it would be difficult to support it upon principle without altering some of the facts." But this was in a dissenting opinion. And in the same case, Judge COWEN, who gave the opinion of the court, considers and discusses the case, and declares that it has never been overruled, adopts its reasoning, and affirms the principle upon which it was decided, as the same learned judge had done before in *Ash v. Putnam* (1 Hill, 810), where there was no dissent to the decision or opinion. Speaking then of the case of *Atkins v. Barwick*, he says: "There was either a resale or rescission, or a refusal by the vendee to accept. Call it which you please, the effect is the same. In one case, the property is revested in the vendors; in the other, it was never divested."

The difficulty in all the class of cases like the present has been to fix the point of time when the title of the vendor became revested. The right of rescission, or resale, is undoubted; but the question is, whether the rescission or resale is consummated before the assent of the vendor to such rescission or resale is actually given or expressed. The moment the minds of the vendor and vendee meet on the question, it is conceded, the contract is rescinded, or the property resold and the title revested. If the vendor was present at the same place with the vendee, delivery to him by the vendee in relinquishment of the contract of purchase would, of course, completely restore him to his original rights of property; but when the vendor and vendee live in different places, it has been claimed in many cases that the purpose of the vendee to restore the property was ineffectual, till the consent of the vendor to the rescission of the contract was given, and that, intermediate that period, the title remained in the vendee, and was subject to attachment or execution at the instance

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of his creditors. That is the precise question now presented in this case.

Upon the principles which apply to sales, it is abstractly true that no title can pass till the bargain is complete, and that a contract is not consummated till the minds of the parties meet; and, strictly, this rule must also apply to agreements for the rescission of a contract. It is only upon the doctrine of relation, in such cases, that the title can be held to pass at the time of the delivery of the goods to the third person. This doctrine is generally alleged to apply in cases of trust; and it is upon this ground that the title can be held to pass at the moment the trust is created, as with cases of assignments in trust. Lord MANSFIELD, in *Alderson v. Temple* (4 Burr., 22-89), puts the case of *Atkins v. Barwick* on the proper ground. He said: "The Court of Chancery would have interposed and said 'the assignees should not have the goods without paying the price.' I think the determination was right; and there was an actual delivery to a person who became a trustee."

The direction to hold in trust for the vendor, and to deliver to him, accompanied by a delivery to the warehouse-man, as was done in this case, and that of *Atkins v. Barwick*, is a parol transfer or assignment of the property to the vendor, and vests the property. The doctrine of relation in such case, Judge COWEN says, in *Berly v. Taylor* (*supra*), applies to a delivery of goods in trust. The delivery was held, he says of *Atkins v. Barwick*, to vest the property of the goods in them (the vendors) immediately, subject to be divested by the dissent. This was on the ground that the trust was beneficial, and the presumption was allowed although the vendors at the time knew nothing of the transaction.

This, I think, presents the true ground upon which the plaintiff's claim may securely rest. The delivery of the oil to Kelly, with direction to deliver it to the plaintiff, was a delivery by Wing to the plaintiff, and vested the title in him, unless he expressly disaffirmed the trust in his favor. The trust was irrevocable by Wing. He parted with all claim in or title to the property. He did all in his power to restore the pro-

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perty to the vendor. He acted with an honesty which ought to be encouraged and commended, not overreached and nullified by any manner of technical rules at variance with equity and common justice.

But the plaintiff's title to this oil can be sustained upon the narrow ground mentioned by Lord MANSFIELD in *Harmon v. Fishar* (1 Cowp., 125), and stated by Lord KENYON in *Noote v. Ball* (2 East., 124), that the vendee "*did not accept the goods*," Wing, in this case, before the goods arrived in New York, refused to take them upon the purchase, provided for their storage with Kelly and delivery to the plaintiff, and immediately advised the plaintiff of the fact. Wing then had the goods under his personal control after they arrived at their place of destination. He restored them to the plaintiff in the only way practicable under the circumstances.

I think the judgment below right, and that the same should be affirmed.

DENIO, J. The law of *stoppage in transitu* has no application to this case. The oil was delivered to the purchaser on board his own vessel; and, moreover, supposing it had ever been in the hands of a carrier, it had arrived at its destination, and had passed into the actual possession, or at least had come under the absolute control, of the plaintiff; and it was in no sense on its passage to him.

If the judgment can be sustained, it must be either upon the ground of a rescission of the contract by the mutual consent of seller and purchaser, or of a reconveyance and redelivery of the goods to him, or to a third person for his use, in payment of the debt contracted by their purchase, and by way of preference in favor of the plaintiff as a creditor; and I think it can be sustained on the first of these grounds. The statement of facts is not as precise as could be desired; for it is not stated in it whether the plaintiff's clerk had or had not such a control of the business of his principal as authorized him to act upon the communication of Wing; nor what determination he came to upon the receipt of Wing's

letter; or what he said to Wing when he saw him on the 10th July. If he had the general authority of a managing clerk, in the absence of his principal, and if he immediately elected to take back the goods in pursuance of the offer of Wing, and communicated that determination to Wing, and went about securing the actual possession without unnecessary delay, I think that would be a sufficient rescinding of the sale. As the letter of Wing did not mention the place where, or the person with whom, the oil was stored, the only thing which the clerk could do was that which, in effect, he did do, namely, to see Wing, and ascertain these necessary facts. This could not be brought about in time to send to New York until after the service of the attachment. But if the clerk, with sufficient authority, consented to receive back the oil, and communicated such determination to Wing on the 10th, when he went to Falmouth, I think the sale was rescinded; and although the attachment was levied on the same day, it does not appear that it was prior to the interview with Wing. The case of *Salte v. Field* (5 Term, 211), and *Smith v. Field* (id., 402), are in point.

By the application of the rules by which we examine cases brought here upon statements of facts, I think we ought to intend that the circumstances which I have suggested as necessary to a perfect rescission existed in this case. It is incumbent on the party appealing, to show that the judgment is contrary to law; and it is not sufficient that the case is so imperfectly stated that the law applicable to it cannot be ascertained. If we applied to such cases the principles by which special verdicts are tested, scarcely a judgment which is brought before us could be sustained. In cases of special verdicts the inquiry is, whether facts enough are found to sustain the judgment. If not, it is reversed. But in such cases as the present, the question is, whether, upon the facts stated, we can adjudge that the judgment is contrary to law. Unless we come to such a conclusion, the judgment must be an affirmance. The facts which are stated in this case are perfectly consistent with those which I have considered as essential to constitute a

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rescission of the sale. The clerk acted as though he had authority to accept the offer of Wing, contained in the letter; for he sent a message to New York to the plaintiff's correspondent to take possession of the oil as soon as he ascertained where it was stored. He acted throughout as though determined to accept the offered abandonment of the purchase. It is not found, in so many words, that he told Wing that he would take the property back; but it is stated that the object of his journey to Falmouth, where Wing was, was to ascertain where, that is, in what storehouse, or with what person, the oil was stored; and immediately on his return he dispatched the telegraphic message to New York to take the delivery of it for the plaintiff. The idea that the message to those correspondents was to make a seizure under the law of *stoppage in transitu* is not found in the case; and it is improbable, upon the facts which are found. It would be absurd to attempt to make a seizure under the law of *stoppage in transitu* when the goods had reached the purchaser's hands at the place of destination, and he had placed them in the hands of a third person for the use of the seller, and had given him notice to come and take them. The facts actually found being in harmony with the supposition that the clerk notified Wing that the plaintiff accepted his offer, it was the business of the defendant, if he would impeach the judgment, as being against law, to have procured a statement which should have affirmed the disputed fact to be such as he assumes it to be. For these reasons, and without examining the further questions alluded to, I am for the affirmance of the judgment of the Supreme Court.

All the judges concurred in the judgment, without indicating upon which of the opinions they based their determination.

Judgment affirmed.

Farmers' and Mechanics' Bank of Genesee v. Wadsworth.

FARMERS' AND MECHANICS' BANK OF GENESEE v. WADSWORTH *et al.*

The ownership of a promissory note by the plaintiff is sufficiently shown by the averment of its making, indorsement and delivery to him before maturity, for a valuable consideration, though coupled with the statement that it was, "by the Bank of Commerce, in the city of New York, which then held the same," presented for payment at another bank in that city, where it was payable.

The statement in respect to the Bank of Commerce imports only a holding as the plaintiff's agent for collection, and not ownership.

APPEAL from the Superior Court of the city of Buffalo. The complaint stated the making and indorsement of a promissory note for \$12,500, dated at Buffalo, and payable at the Bank of North America, in the city of New York, and its delivery to the plaintiff before maturity for a valuable consideration and in the ordinary course of business. It further averred that, on the day of its maturity, the note "was, by the Bank of Commerce in New York, which then held the said note, through a notary public, presented at the Bank of North America to the paying teller therein for payment, and payment was demanded and refused." There was no other allegation of ownership of the note by the plaintiff. The maker and indorser joined in a demurrer to the complaint, which was overruled, and the defendants appealed to this court.

Amasa J. Parker, for the appellants.

John Lawson, for the respondent.

BY THE COURT. The only ground on which the demurrer in this case is sought to be sustained is, that the plaintiff shows no title to the bill of exchange which is the subject of the action, but, on the contrary, that title is shown out of the plaintiff on the face of the complaint. This objection has hardly the merit of plausibility. The complaint avers the making and indorsement of the bill, and that, for a valuable consideration;

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in the usual course of business, and before maturity, it was transferred and delivered to the plaintiff. The other allegation in respect to it is, that, on the day it fell due, it was, "by the Bank of Commerce, which then held the same," presented for payment.

This is not an allegation of ownership by the Bank of Commerce, but, at most, of a deposit of the note, and a holding of the same as the agent of the plaintiff, and for the purposes of presentation; the note being, by its terms, payable at a bank in the city of New York. The fact of the possession of a note at the time of its presentation is of itself *prima facie* evidence of ownership, and unless the title is specifically denied, its production on the trial will entitle the plaintiff to recover upon it.

Judgment affirmed.

EHLE v. THE CHITTENANGO BANK.

A dividend of the profits of a banking association, declared by the directors "payable in New York State currency," is payable in cash. The directors have no authority to declare it payable otherwise.

Evidence of an understanding by the cashier that "State currency" meant country bank notes current in New York city at a discount of a quarter of one per cent, but not showing a general usage in that sense, is inadmissible.

APPEAL from the Supreme Court. The plaintiff sued, as a stockholder of the bank, to recover fifty-six dollars due him for a dividend. Upon the trial it appeared that the defendant was a banking association organized under the general law of 1888. The directors declared a dividend of four per cent, payable, by the terms of their resolution, "in New York State currency." The referee, under exception, allowed the cashier to testify that, by the terms "New York State currency," he understood bills that are quoted at a quarter of one per cent below par in the city of New York. The plaintiff demanded

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his dividend in specie or in the bills of the bank, which was refused; the defendant tendering to him the bills of solvent country banks of this State (other than its own), which were current in New York city at a discount of one-quarter of one per cent. The referee reported in favor of the defendant, and the judgment entered upon his report having been affirmed at general term in the fifth district, the plaintiff appealed to this court.

Charles Stebbins, for the appellant.

Sidney T. Fairchild, for the respondent.

WRIGHT, J. I am for reversal, for the following reasons:

1st. The dividend declared and demanded was, not of current or uncurrent bills or property possessed by the bank (which might be specifically divided amongst the stockholders), but was a portion of the surplus or net earnings of the association. It was a dividend of \$6,000 of cash profits realized, and set apart as due to the stockholders. So much of the cash earnings of the association were withdrawn from its business and divided *pro rata* amongst the stockholders as the earnings of their capital invested in the stock. The bank became the debtor of the stockholders when the dividend, by the terms of the resolution, was payable. I think that the stockholder was entitled to demand his dividend in money; and that an offer to pay in uncurrent bills, of banks that might happen to be solvent when such dividend was payable, would not exonerate the association. If the terms "New York State currency," employed in the resolution, mean anything other than money, or mean, as the cashier seems to have understood, bank bills, that are quoted at a quarter per cent below par in the city of New York, there was no authority in the board of directors to declare that a dividend of the cash profits of the bank should be paid in depreciated bank notes.

2d. I think the question put to the cashier: "What do you understand by New York State currency?" was incompetent and inadmissible. His understanding of the phrase was imma-

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trial, and the evidence did not tend, in any degree, to show in what sense the directors understood, or for what purpose they used it in the resolution. The term "New York State currency" must be held to mean what the ordinary signification of those words imply, unless, by some general known usage, some other technical meaning can be attached to it. The testimony of the cashier as to what he understood the phrase to mean, did not tend to prove any such known usage; or that the directors, when they used the term in their resolution making the dividend, understood it as he did.

The judgment should be reversed, and a new trial ordered, with costs to abide event.

Judgment reversed, and new trial ordered.

THE AMERICAN LINEN THREAD CO. v. WORTENDYKE & CO.

"When notice of change of firm name is relied upon to exonerate a retiring partner, such change must show that he has withdrawn from the business. A change not indicating this, is insufficient to put dealers upon inquiry.

Accordingly, where one of three brothers, under the firm of Wortendyke Brothers, retired, and, being succeeded by H., the firm was changed to Wortendyke Brothers & Co., — *Held*, that a dealer with the firm was warranted in assuming that all the former partners remained in the business, and, until notice to the contrary, the brother who had retired continued liable.

ACTION in the Supreme Court on a note for \$808.04, made May 9, 1859, by "Wortendyke Bros. & Co." to the order of the plaintiffs, six months from date. Defense, that the defendant, David D. A. Wortendyke, was not a partner of the firm who were the makers. The evidence showed that he was not in fact such partner; but the plaintiffs claimed that he was, nevertheless, liable to them upon the note, under the law of partnership. It appeared that, for some time prior to September 1, 1858, three brothers, the defendants, David D. A., Isaac, and John B. Wortendyke, were general partners, trading under

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the firm name of Wortendyke Brothers in the city of New York; and that the plaintiffs, a manufacturing corporation at Mechanicsville, had, in the year 1858, and prior to the 1st September, sold to that firm goods on credit at different times, to the amount of more than \$600. On said first day of September, the firm was dissolved; and a new firm was formed on the same day, consisting of Isaac and John B. Wortendyke, and of Peter R. Hoffman, the other defendant, who was then first introduced into the concern; and thereafter this new firm transacted the same kind of business, in the same store, under the firm name of Wortendyke Brothers & Co.; and they kept the sign of the former firm over the store. The plaintiffs had no actual notice of the withdrawal of D. D. A. Wortendyke from the firm; but a notice of the dissolution, which disclosed the names of the partners of both firms, was immediately published in two daily papers in New York, and the publication was inserted during four weeks. The plaintiffs continued to furnish goods to the concern on credit after the dissolution; the orders for which were transmitted to them by letters, signed Wortendyke Brothers & Co. The note sued on was given for the price of the goods thus furnished.

The referee, before whom the case was tried, held that David D. A. Wortendyke was liable on the note with the other defendants; but the court, at general term, on his appeal, reversed this judgment, so far as he was implicated, and ordered a new trial as to him; from which order the plaintiffs appealed, giving the usual stipulation. The case was submitted on printed briefs.

H. F. Ballard, for the appellants.

H. P. Allen, for the respondent.

DENIO, J. The defendant's counsel insists that the new dealing, which formed the consideration of the note sued on, was not with the firm with which the plaintiffs had previously dealt; and that the rule requiring notice, in order to protect a former partner who had ceased to be interested, does not

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apply. This argument is not satisfactory; for in every case where a partner has withdrawn, and there is a further dealing with the remaining partners, under such circumstances as to leave the retiring partner responsible, the contract is not between the creditor and the former firm, but it is with a new firm, which the creditor has been led to believe still embraced the partner who has in fact gone out. The bare fact, therefore, of the dissolution of the old firm and the creation of a new one, with which the credit sought to be enforced was had, and which did not embrace one of the old partners, is not conclusive against the plaintiffs. Indeed, it is upon such a state of facts that the question is generally presented. The liability of the defendant depends upon other considerations. Nor does the circumstance that another partner is actually introduced into the firm furnish a conclusive reason against the operation of the rule. If the creditor is not informed of the fact, as where the same firm name is used, and the same kind of business is transacted, and some of the former partners remain, the creditor may still hold a member of the former firm liable though he has retired. Here the same business was carried on at the same place, and a portion of the partners were the same. But a new firm name is introduced; and upon that alone the present question arises. If the change in the name were such as to indicate that the defendant was no longer a partner, there would be no pretence for holding him liable. Cases of that kind are reported. There was a firm of bankers, transacting business under the name of Dickenson, Goodall & Fisher, with whom the plaintiff's testator kept an account. In 1799, Fisher ceased to be a partner, but the plaintiff continued to deposit and draw; and in 1805 the partnership became bankrupt, having a balance in their hands of \$2,000 to the credit of the plaintiff's testator. No notice of the retirement of Fisher had been given; but it appeared that immediately after he had withdrawn, the testator was furnished by the bank with printed checks, addressed to Dickenson, Goodall & Co.; and subsequently, when another Dickenson was taken into the firm, the checks were again

changed to Dickenson, Goodall & Dickenson. The testator made use of these checks; a great number of which he filled up, signed and caused to be presented. The question was, whether Fisher remained responsible for the dealings which took place after he had withdrawn; and it was held, that he was not responsible. Lord ELLENBOROUGH said that when the testator had been accustomed to draw upon checks furnished him with the name of Fisher, and others were sent him with the name of Fisher omitted, before using these it became him to inquire what change had really taken place; "and when he did continue to use them, I must presume (he added) that he was perfectly well aware that Fisher had retired, and that he continued to deal with the house upon the credit of the other partners." (*Barfoot v. Goodall*, 3 Campb., 147). A case of the same nature was lately decided in the Supreme Court of this State. There was a firm of Hewett & Co., consisting of the defendants, Henry and William R. Hewett. They dissolved, but gave no notice of dissolution. Afterwards the plaintiff sold goods to William R. Hewett, charged them to him and made out the bill in his name, and finally took his individual note for the amount; he declaring, as it was proved, that Henry was still interested with him, and that they were using his individual name in the business for some purpose relating to the collection of debts. It was very correctly decided that, when this new name was introduced, the plaintiff was bound to ascertain to whom he was giving credit; and that the false declarations of William did not affect the question.

These two cases, it seems to me, stand upon the ground that the name of the firm was altered in such a manner as to indicate to those dealing with it that the person sought to be charged with the subsequent dealings had withdrawn. In the first case, the name of Fisher formed a part of the title of the old firm. When a name was subsequently adopted, in which the name of Fisher was omitted, any one would understand that he had ceased to be interested. So in the other case: the name first used showed that, *prima facie*, there was more

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than one partner; that Henry and William Hewett were trading under that name. The name subsequently adopted, and under which the dealing in dispute was had, showed, to a common intent, that there was only one person concerned; namely, William R. Hewett. To be sure, the plaintiff was told that Henry was still interested, but that was false; and Henry was not responsible for the deception. If the plaintiff was deceived by that, it was his own misfortune. But the defendant was responsible that the business should not be continued under a name calculated to deceive the world or former dealers with them; and he could not be charged with neglecting any necessary precaution, when the name used in the subsequent dealings was such as to indicate that he was no longer concerned. I will now mention a case where, although there was, in effect, a dissolution, and the organization of another firm with a different name, the retiring partner was held liable, because the change of name did not indicate that he was the partner going out. (*Howe v. Thayer*, 17 Pick., 91.) The defendants were Thayer and Fellows, who, together with one Colton, were claimed to have been in partnership until June 23, 1830, when a dissolution took place, and the business, which seems to have been the carrying on of a boarding school, was continued by Fellows and one Newton. The plaintiff had furnished provisions for the use of the institution, both before and after the change; and the question was, whether Thayer was liable for those furnished after he had ceased to be interested. Before the change, the firm name of Colton & Fellows was used; and afterwards, that of Newton & Fellows was adopted; and during the whole time, the name of The Mount Pleasant Institution was also employed to some extent in their dealings. It will be seen that the name of Thayer, whose liability was alone in contest, was not found in either title; but the change from Colton & Fellows to Newton & Fellows showed, *prima facie*, that Colton had withdrawn, and that Newton had been taken in. Hence, the defendant's point was, that if the plaintiff knew that Colton had ceased to be a member of the firm, it was in law a notice to him of the dissolu-

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tion of the partnership as to all its members; that, by the withdrawal of one partner, the identity of the partnership was destroyed; and that if the plaintiff doubted the responsibility of the new firm, unless Thayer was liable for their contracts, he should have inquired whether he continued to be a member. The charge to the jury was, that the change of the firm from Colton & Fellows to Newton & Fellows had no tendency to prove that Thayer had ceased to be a partner, if it were shown that before that time he was a partner; but if the plaintiff knew of the change, and knew that after that, Newton & Fellows only were answerable, the plaintiff could not recover for the supplies subsequently furnished. On a review of this charge, upon exceptions, after a verdict for the plaintiff, it was held to be correct. The court, by Chief Justice SHAW, who drew up the opinion, said: "When a business is carried on by three or more as partners, and one withdraws, or one is added, or both, and notice thereof given, and the business is carried on as before, those as to whom no notice is given must be presumed to hold the same relation to the concern that they did before; and such change furnishes no presumption that the others have ceased to be partners. If the plaintiff knew that Colton had withdrawn, and ceased to be a partner, it was not in law a notice to the plaintiff of the dissolution of the partnership, as to all its members, to the effect contended for, and to the purpose for which that proposition was advanced, namely, to exempt the other members from liability; or if it was, in a certain sense, evidence and notice of the dissolution of the same identical partnership that existed before, it was at the same time evidence and notice of the formation of a new partnership among all the remaining members of the firm to carry on the same business, holding the same relation to its customers and the public, with the single exception implied by the fact that the retiring partner will be no longer liable for new contracts, and that the succeeding partner will thenceforward become liable." He added, that "the withdrawal of one partner other than the defendant, Thayer, and the accession of another, the business in other respects going

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on as before, was not evidence from which a jury should infer a dissolution in respect to the defendant, Thayer; but if he knew that by the new arrangement Newton & Fellows alone were to compose the partnership, before he furnished the supplies, the defendant, Thayer, would not be responsible." None of these cases can be regarded strictly as authority; but being the judgments of respectable courts, acting upon the principles of the common law, we should prefer to follow rather than depart from them, unless they seem inconsistent with sound reason or with legal analogies. The proposition which they all tend to establish, and which is distinctly laid down in the last, is, that when a notice of a change of firm name is relied on to exonerate one who has been a partner, such change must show that he has withdrawn from the business; and any change which does not indicate that, does not put dealers with the concern upon inquiry. They may safely assume, until they have notice to the contrary, that all the former partners not apparently affected by the change of name yet remain in the business. There is certainly some force in the argument that, where any change is made in the members of a copartnership, the identity of the commercial society is destroyed; and that the arrangement which takes its place is substantially a new society; and that parties proposing to deal with it must ascertain who its members are, in the same manner as though it had no connection with any previous arrangement. But I think that position would be likely often to sacrifice substantial justice to considerations of form. The present case affords a pretty striking instance of the superior equity of the rule laid down by Chief Justice SHAW. The three brothers Wortendyke were in partnership, and the plaintiff may be supposed to have known of whom that firm was composed. The name which they gave it indicated that it was composed of several persons of that name, who were brothers. As to that, there was no change effected by the new name: it was still Wortendyke Brothers, and something more. The added words, standing for *and company*, do not carry the idea that the brothers, who were up to that time concerned toge-

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ther, had separated, or that any of them had withdrawn; but, rather, that there had been an addition of one or more persons to the concern, who would not have been indicated by the former title. This, I think, is the inference which nearly every person would draw from the change of name. The plaintiff, it is true, might have acted upon the mere formal view of the matter, and have made inquiries; and the partners might also have given personal notice of the character of the change to all their correspondents. In the absence of that precaution, I think it more just to impute to the plaintiff only a knowledge of the change which the new firm name indicates; namely, that a new partner, or new partners, had been taken in; the former partners continuing to be interested as before.

These views, if concurred in, will lead to the reversal of the order for a new trial, and for judgment absolute in favor of the plaintiffs on the report of the referee.

DAVIES, WRIGHT, GOULD and ALLEN, Js., concurred.

SUTHERLAND, J., (dissenting.) The defendant, David D. A. Wortendyke, never was a member of the firm of Wortendyke Brothers & Co. This fact is conceded. The note on which this action was brought was made by the firm of Wortendyke Brothers & Co., for a debt contracted by that firm. This is also conceded. It follows, that the plaintiffs cannot recover on the note against David D. A. Wortendyke, on the ground that he was in fact a member of the firm of Wortendyke Brothers & Co., when the note was made, and was therefore bound by it. In other words, it follows from the conceded facts of the case that the plaintiffs cannot recover against the defendant, David D. A. Wortendyke, on the note, on the ground that the note was made by him and the other defendants who did compose the firm of Wortendyke Brothers & Co.

But the plaintiffs insist that the defendant, David D. A. Wortendyke, is estopped from setting up, or saying, that he was not in fact a member of the firm of Wortendyke Brothers & Co., when the note was made, or when the goods for which the note was given were sold to that firm.

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There is no evidence whatever in the case that the defendant, David D. A. Wortendyke, ever at any time represented himself to be a member of the firm of Wortendyke Brothers & Co., or that he ever held himself out to the plaintiffs, by his acts or declarations, to be a member of that firm, otherwise than by omitting to notify the plaintiffs that he was not a member of that firm. The plaintiffs rely upon his omission or neglect to give this notice as estopping him from availing himself of the defence that he was not, in fact, a member of the firm of Wortendyke Brothers & Co.

The conceded facts which present this question of estoppel are these: Previous to September 1, 1858, there was a firm of "Wortendyke Brothers," composed of the defendants, David D. A., Isaac, and John B. Wortendyke, who were brothers. On the 1st September, 1858, this firm was dissolved, and a new firm formed, composed of Isaac and John B. Wortendyke, and one Peter R. Hoffman, under the firm name of "Wortendyke Brothers & Co." The plaintiffs had dealt with the old firm, and knew of the change in the partnership name, and that Peter R. Hoffman had become a member of the new firm previous to the making of the note on which the action was brought, and previous to the sale of the goods to the new firm for which the note was given.

The plaintiffs insist that notice of the change in the firm name, and of the fact that Hoffman had become a member of the new firm, was not notice to them of the fact that the defendant, David D. A. Wortendyke, had retired from the firm, and had ceased to be a member of it; that they had a right to believe, in the absence of such notice, that he continued to be and was a member of the new firm, and to trust the new firm on the ground that he was such member.

It can hardly be said, I think, that the notice or knowledge of the change in the firm name, and of the fact that Hoffman had become a member of the new firm, was notice to the plaintiffs that David D. A. Wortendyke was not a member of the new firm; but I think the question in the case is this: Under the circumstances, was it the duty of David D. A. Wortendyke

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dyke to notify the plaintiffs that he had retired from the firm; or was the notice or knowledge which the plaintiffs had of the change in the firm name, and of the fact that Hoffman had become a member of the new firm, sufficient to put the plaintiffs upon the inquiry, and to have made it their duty to inquire, as to who composed the new firm, and whether David D. A. Wortendyke was or was not a member of the new firm?

I am not aware of any case in which it has been held that mere silence or omission to give notice, under such circumstances, operated as an estoppel. I do not see upon what principle it can be so held.

I think it was the duty of the plaintiffs, under the circumstances, to inquire whether David D. A. Wortendyke was or was not a member of the new firm, before they trusted the new firm on the ground that he was a member. Their knowledge of the change in the firm name alone was, I think, sufficient to have put them on this inquiry. This appears to have been held in the case of *Kirby v. Hewitt* (26 Barb., 607).

My conclusion is, that the order of the Supreme Court granting a new trial as to the respondent should be affirmed with costs.

SMITH, J., also dissented.

Judgment reversed, and judgment absolute for plaintiff.

THE PEOPLE, *ex rel.* WILLIAMS, *v.* KINGMAN *et al.*

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Ground adjoining a saw-mill and used for piling logs, but whose limits are not fixed by fences or other visible marks, nor by definite occupation, is not within the statute (1 R. S., p. 514, § 57) prohibiting the laying out of public roads through mill-yards.

It is the duty of the commissioners, in laying a highway over such ground, to leave a sufficient area for the use of the mill-owner, and their discretion as to the quantum is not reviewable in any other proceeding.

The ditch or canal by which the water is conducted to a mill is not a building, fixture or erection within the meaning of the statute. *At*

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highway may be laid along it, comprehending it in whole or in part within the limits of the road; but if necessary to work the road to its entire width, it must be by so constructing a roadway over the channel as not to obstruct the flow of water.

It is not essential to a highway, at common law or under our statute, that it be a thoroughfare. A road may be laid out by the public authority which has no issue at one extremity, and abuts upon private ground.

ERROR to the Supreme Court to review a judgment awarding a peremptory mandamus to the commissioners of highways of the town of Cincinnati, in Cortland county, requiring them to assess the damages occasioned by the laying out of a certain highway in that town, and to open the highway by removing the fences and marking the same.

The highway had been laid out by referees under the act of 1847 (ch. 455), after a refusal by the commissioners to lay it out, and after an appeal from their decision, and a reversal of that decision by such referees. No question arose respecting the regularity of these proceedings, if the referees had jurisdiction; and their jurisdiction was questioned only upon the ground that the road, as laid out, ran through the yard of a saw-mill, which was alleged to be necessary to the use and enjoyment of the mill; and on the further ground that, for a part of its course, it ran upon a canal or artificial channel used to conduct water to the mill-wheel. But it was also urged on the argument here, that the southern terminus of the road did not connect with any other public road, and therefore it was not, as it was claimed, a legal highway. The fact of such a want of connection was set up in the return, and was not denied. An issue, involving the question first mentioned, was made up by a plea in bar to the return to the alternative writ, and a replication put in by the relator. The evidence at the trial related principally to the mill-yard of Warner Harrington. This person was the owner of a saw-mill situated on the west-
erly side of the Otselec river, which here runs in a southerly direction. The supply of water to drive the wheel is not furnished by the river, but is brought in a canal or ditch from another stream, which canal runs to the mill at the river, form-

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ing an acute angle with it at the northerly or upper side. On the southerly side of the ditch, and the westerly side of the river, the ground appears to have been open and uninclosed, and a portion of it had been used for piling logs brought to the mill to be sawed. The highway, as laid out, runs through this ground in such a manner as to leave a triangular piece of land, containing sixty square rods, between it and the river and the ditch. Much of the evidence was addressed to the question whether this piece of land was of sufficient dimensions for a yard for piling saw-logs for this mill; some of the evidence showing that some saw-logs had formerly been deposited beyond it and on the ground occupied by the track of the highway. Two of the three referees who laid out the road were examined, and testified that they, on that occasion, examined witnesses on oath as to the sufficiency of the ground for a mill-yard, and came to the conclusion that enough space would be left after the road should be opened. The judge decided, in effect, that the road was not laid out in violation of the statute in this respect, and that the decision of the referees as to the quantity of land which was necessary as a yard for the use and enjoyment of the saw-mill was conclusive, and could not be controverted in this action.

It appeared that the highway, as laid out, crosses the canal or ditch, and that, for the distance of eighteen rods, before so crossing, it runs along the ditch in such a way as to include such ditch in the width of three rods allotted to the highway, the centre line of the road being on the northerly line of the ditch, which, at that place, is about one rod wide at the top, the depth of the water being two or three feet. The judge held that there was not an excess of jurisdiction on the part of the referees. And, finally, he directed a verdict for the plaintiff on the several issues, which was accordingly rendered. The defendants' counsel excepted to the several rulings above mentioned.

Judgment was given for a peremptory mandamus, directing the defendants, as commissioners, to proceed to open the road, &c.

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John H. Reynolds, for the plaintiff in error.

Mr. Seymour, for the defendants in error.

DENIO, J. This case depends mainly upon the application to the facts proved of the provision of the Revised Statutes which declares that no public road "shall be laid out through any buildings, or any fixtures or erections for the purpose of trade or manufactures, or any yards or inclosures necessary to the use or enjoyment thereof, without the consent of the owner." (1 R. S., p. 514, § 57.) It is claimed that the highway in controversy was laid through a yard appertaining to the saw-mill of Mr. Harrington, and that such yard was necessary to the enjoyment of the mill. The evidence does not disclose that there was any piece of ground distinctly defined by fences or otherwise, and used as a mill-yard; but it appeared that there was unoccupied land adjacent to the mill, and belonging to the owner of the mill, upon a portion of which logs drawn there to be sawn had often been left. The mill-yard of a saw-mill I understand to be a place appropriated for the deposit of logs to be sawn, and for the piling of lumber which has been manufactured from such logs. I do not suppose that it is necessary that it should be inclosed by fences, in order to be protected by the statute; but we can form no clear notion of a yard whose boundaries are not defined in any way, either by an inclosure, by visible marks, or by a definite occupation within certain exterior lines. If a mill be situated in, or adjacent to a field of much larger extent than would be necessary for the mill-yard, no one would pretend that every part of it would be wholly shielded from the action of the authorities intrusted with the laying out of highways. Nor would every portion of the space upon which logs or lumber had at any time been piled be thus privileged. The facts proved on this trial presented a case for the judgment of some officer or tribunal as to the area which ought to be left undisturbed for the use of the proprietor of the mill, in the bestowal of the logs which might be brought to it and the lumber which should be sawn from them. Although no definite parcel of

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ground should have been set apart for these purposes, the public could not, in my opinion, legally run a road in such a manner as to cut off all accommodation of that kind for the use of the mill. The counsel for the plaintiff in error maintains, in effect, that it is a question for the jury, in any collateral action in which the question may arise, whether the just rights of the owner in this particular have been infringed or not; while, on the other side, it is claimed, and the judge has decided, that the referees, whose duty it was to lay out the road, had the exclusive right to determine the question, and that their decision cannot be reviewed in any other proceeding. I am of this latter opinion. There was not here any mill-yard, properly so called, or within the sense of this statute. The proprietor of the mill was also the owner of the land about it, and, before the road was laid, he used such parts of it for the stowage of logs as he thought fit, and this he had a perfect right to do. When the officers authorized to lay out roads came there, they found a mill, but not a mill-yard. They were required, I think, by the spirit of the statute, so to lay the road, if they elected to lay out one on that route, as to leave land enough, between the road and the mill, out of which the owner could form a mill-yard. The extent of the area to be thus left was not a question affecting their jurisdiction, but it was a matter which the law had committed to their official discretion. It is possible that a clear abuse of their authority might subject them to an action on the case at the suit of the party injured; but, so far as the public is concerned, the highway thus laid out was a legal highway, and it was the duty of the commissioners to proceed to open it.

It was not necessary for the referees to state, in the order made by them, that they had considered and adjudged that sufficient space had been left between the highway and the river and canal to form a mill-yard. Everything necessary to be determined by them was embraced in the conclusion mentioned in the paper signed by them, in which they set forth the reversal of the decision of the commissioners, and gave the location of the road as laid out by them.

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Upon the other point, also, I think the judgment of the Supreme Court was right. The channel by which the water was conducted from the creek to the saw-mill was not a building or fixture, within any natural or fair meaning of these terms. Neither was it an erection, within the sense of the statute. That term implies some structure superimposed upon the land; and, under this act, it means something which a highway may be laid through, and which would be rendered useless by that act. The clause was probably introduced in consequence of the decision in *Clark v. Phelps* (4 Cow., 100), where it was held that a highway could not be laid out through a range of tenter-bars belonging to a fulling-mill, or through a corn-crib, or the yard of a saw-mill or a fulling-mill. It was a singularly free interpretation of the then existing statute, which did not contain the inhibition which was subsequently inserted, and which we are now considering. That provision was, no doubt introduced into the Revised Statutes to establish on a more firm foundation and to define a wise rule upon that subject; and it should be construed, like other statutes, by the terms made use of. The language is limited to structures of the nature of those involved in the case referred to; and there is nothing in it which can well be applied to a water-course, natural or artificial. Highways are never laid through streams of water, but it is, of course, quite common to pass over them by bridges. Where the highway in question crosses the canal, it must run over it by means of a bridge. It would be an abuse of terms to say that it was to run through it. So where it runs along the channel, embracing it in its width, it is not to be understood that the water-course is to be filled up. If it were certain that the road could not be otherwise opened than by destroying the channel, and thus shutting off the water from the mill of Mr. Harrington, I should be inclined to hold that the case would be within the equity, though it is not within the exact language, of the act; for it could not be admitted, without great absurdity, that, while the law protects the mill itself as a building, and the yard as a necessary appendage, it should be allowed to the

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officers to render them both valueless by so laying out the road as to destroy the supply of water by which the mill was driven. If it is necessary to work the road in its whole width, it must be done by constructing a roadway over the channel in such a manner as not to interrupt the flow of water to the mill.

The remaining question is, whether the highway in question is illegal, and the proceedings to lay it out void, for the reason that it does not connect with any other public highway or navigable water at one of its extremities. This point was not made at the trial; and if the case came here on appeal, it could not be considered. But the fact relied on is admitted by the pleadings; and, being thus upon the record, must be disposed of before judgment can be given. It is, moreover, a question of considerable practical importance; and, if it be doubtful, should be put at rest. It arose, for the first time in this State, in the present Supreme Court, in *Wiggins v. Tallmadge* (11 Barb., 457, anno 1851). It was an action brought to recover a penalty for an alleged obstruction of a highway. The road had been thrown open by private proprietors, and used by the public for a considerable time; and then the commissioners of highways ascertained, described and entered it of record, pursuant to the highway act. It connected at one end with a highway, duly laid out; but there was no means of egress at the other end. It was held by the court, Judge HAND giving the opinion, that it was a legal highway. The English cases are attentively examined, after the manner of that learned person, and he came to the conclusion that a *cul de sac* may be a good highway if laid out by the proper authorities. Judge CARY dissented. The same question, among others, was involved in *Holdane v. The Trustees of Coldspring*, reported in the Supreme Court (23 Barb., 103). The road, which was attempted to be established by proof of dedication by the owners of the land and acceptance by the public authorities, came to an end at one terminus upon the private grounds of an individual; while, at the other, it connected with a public street in the village of Coldspring. It was held not to be a

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legal highway; two of the three judges of the Supreme Court putting the decision on the ground that a highway must be a thoroughfare, which the one in question confessedly was not. The remaining judge concurred in the conclusion, but placed his opinion upon the ground that it was not shown that the dedication was accepted on the part of the public; and that it was, therefore, incomplete. On appeal here, the judgment of affirmance which was rendered was placed upon the ground that no complete and irrevocable dedication was shown, and no particular examination was made of the ground upon which the judgment of the Supreme Court was based.

All the judges who have examined the point have considered it purely a common-law question, and have based their views upon the statements of English writers and judges. The opinion of Judge EMOTT, as a referee, in the case of *Holdane v. The Trustees of Coldspring*, which he adhered to on the decision of the case at the general term of the Supreme Court, and which, though not published in the report by Mr. Barbour, may be found attached to the printed case, contains a careful reference to all the principal English authorities except the late one, presently to be noticed. This opinion, together with that prepared by Judge HAND in *Wiggins v. Tallmadge*, will sufficiently show the state of the question in the English courts, so far as their decisions were known here at the time these cases were adjudged. It could not be considered as very clearly settled either way, when so wide a difference of opinion respecting it could prevail among learned judges.

The case of *Bateman v. Black* came before the Court of Queen's Bench in 1852. It was trespass, for entering the plaintiff's close and pulling down a wall there. The defendant pleaded that the *locus in quo* was a public and common highway for all the Queen's subjects, to go, return, &c. Replication, traversing the existence of the highway. There were other issues not material to be stated. At the trial, before Lord CAMPBELL, Ch. J., it appeared that the *locus in quo* was a passage, leading from the public street up to a

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court, of which the plaintiff was the owner, and which consisted of fourteen or fifteen houses; but there was no thoroughfare through the court. The defendant had a house abutting on the passage, into which a doorway had been opened by him. The plaintiff required the defendant to block up this door, which he refused to do; and consequently the plaintiff directed a wall to be built in the court, so as to block up the defendant's doorway. This wall the defendant knocked down while it was being erected, which was the trespass complained of. The passage had been paved and lighted by the local authorities. Lord CAMPBELL directed a verdict for the defendant on the issue which has been mentioned, with leave for the plaintiff to move. On showing cause, the plaintiff's counsel admitted that the point, that this could not be a highway because there was no thoroughfare, had never been decided; but he referred to various dicta of judges on that side of the question. On the other side, it was urged that it was a mere *cul de sac*, and no thoroughfare; and that, hence, it could not be a highway. Besides the principal point, a question of dedication was discussed. Lord CAMPBELL announced his opinion as follows: "We must take it that there is a good finding on this issue, unless there cannot, in point of law, be a good highway where there is no thoroughfare. Now such a position cannot, I think, be supported. There may be, or there may not be, a highway under such circumstances. It would be very strong to hold that there could be no highway, even where there has been an express dedication to a public purpose, because the place is no thoroughfare. There may be a large square with only one entrance to it; and if the owner allows the public to use it without restriction for a great many years, he cannot afterwards turn round and say they were all trespassers. That would be, as said by Lord KENYON, a trap to catch trespassers. In *The Trustees of Rugby Chantry v. Merryweather* (11 East, 375, n.), Lord KENYON laid it down that there might be a public highway where there was a *cul de sac*; and that it was a question for a jury, on the evidence, whether such a place was a highway or

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not. I do not find that this case has ever been expressly overruled. In the other cases referred to, the judges do not hold that such a highway does not exist, but only say that there is no evidence of there being a highway. It seems to me that it rests on the principle of convenience, that there may be a highway without a thoroughfare; and it is not inconsistent with what is laid down by Hawkins and other text-writers on the subject. The jury having here found that there was a highway, the fourth plea [which set up the existence of the highway], is made out, and, being unobjectionable in point of law, the defendant is entitled to judgment upon it." The three other judges, COLERIDGE, EARLE and CROMPTON, expressed similar views. The latter added: "It is always a strong objection to a jury that the way leads nowhere; still, if they are satisfied that it is a highway in point of fact, I know of no objection to their saying so." (14 Eng. Law and Eq., 89.) As I have mentioned, there was a question of dedication in the case; but here the highway has been established by public authority, if it be possible that a highway should exist in a case where there is no mode of egress at one extremity. After this well considered case, I take it no question can now be entertained upon the point at Westminster Hall.

If we were now free to lay down a rule upon the subject, as perhaps we are, the modern English cases not being authorities with us, I should say that the principle which has been thus established in England would be the more convenient and reasonable one. Highways and streets having no issue at one extremity are quite common, and indeed indispensable, in many parts of the country. Take the case of roads leading into the northern wilderness of this State. They extend as far as the country is settled, where they stop, and remain in that condition until the progress of the settlements warrants their further extension. If it were held that they could not be laid out unless they should run quite across the mountains to the northern slope, it would be impossible that they should ever be established. The same remark is true of roads laid

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out in the newly-settled portions of the State bordering upon the original forests. The roads are projected into the wilderness as far as it is necessary or practicable at the time to make them; and afterwards they are extended from time to time, as circumstances may require. For similar reasons, in many of the cities and villages there are short streets leading to ravines and to cliffs, whence there can be no outlet, and where they must necessarily stop; and yet the owners of dwellings, situate upon these passages, find them quite indispensable to the enjoyment of their property; and they would be greatly surprised to be told that they were not legal streets. The same thing is true of streets running to unnavigable waters, or to points on the sea-shore, where there cannot be a harbor or landing-place. Without spending more time upon these illustrations, I feel satisfied that the point insisted on, on behalf of the commissioners of highways, in this case, cannot be maintained. If it was ever supposed to be the law in England, it was on account of certain peculiarities which have only a limited application here. Nearly all the highways in England are such by prescription, dedication or user; and where a way is used by only a limited number of persons, the question will often arise whether it is a public highway or a private passage. This is a question to be determined by a jury; and the fact that the way is or is not a thoroughfare has a very strong bearing upon the issue. It was this which caused Mr. Justice CROMPTON to make the remark, that it was always a strong observation to the jury that the way leads nowhere.

None of the objections to this highway being, in my opinion, tenable, I am in favor of affirming the judgment appealed from.

WRIGHT, GOULD, ALLEN and SMITH, Jr., concurred. DAVIES, J., concurred in so much of the preceding opinion as relates to the mill-yard. He dissented, however, as to the mill-race; holding that, if the public authorities could include it within a highway, they might also fill it up. He was also

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of the opinion that a *cul de sac*, or road having no egress at one extremity, was not in contemplation in the enactment of our statutes regarding highways, though it may be established by dedication. SUTHERLAND, J., also dissented.

Judgment affirmed.

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Where there is no agreement to the contrary, each partner, after a dissolution, possesses the same authority to adjust the affairs of the concern, by collecting its debts and disposing of its property, as before the dissolution.

This right is not lost by the fact that the partnership debts are paid; nor, it seems, does it depend upon the state of the accounts between the partners, at all events not as against persons having no notice of the fact.

APPEAL from the Supreme Court. Action upon a judgment. On the trial, these facts appeared: The plaintiffs were partners, and as such held the note of one Edward Fuller, indorsed by the defendant, upon which indebtedness he confessed judgment to them, and judgment was entered up in their favor, September 5, 1838, for \$1,767.18. The partnership was dissolved in March, 1838; and the defendant had notice of such dissolution in 1839. In 1844, Reuben Robbins, one of the partners, without the knowledge of the other, gave a power of attorney in the name of the firm to his son, E. A. Robbins, to sell the unpaid demands of the firm; and in June, 1844, E. A. Robbins sold the judgment against this defendant to Wells, and at that time Reuben Robbins, in the name of the firm, gave his son an order on Fuller in these words: "H. Fuller: Sir, please pay to E. A. Robbins, or order, and let this be a receipt for the above. R. & B. Robbins. Akron, Ohio, June 15, 1844." Said order was on a paper containing a statement of said judgment. On the back of said paper the following indorsement was made and signed by E. A. Rob-

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bins: "Please pay A. L. Wells, and oblige me, as I have assigned the same to him. E. A. Robbins." Afterwards, in March, 1847, Wells settled the judgment with the defendant for one hundred dollars, agreed to discharge the judgment in full, and executed and delivered to him his own receipt, and a release of the judgment, executed by one Knight. Barna Robbins, the other plaintiff, had no knowledge of, and did not consent to, the giving the power of attorney, and had no knowledge of, and did not consent to, the settlement made by Wells with the defendant, and never received any pay on said judgment, nor did he at any time dispose of his interest in it; and, at the time of giving the power of attorney, the plaintiffs did not owe any debt as copartners. On these facts the plaintiffs claimed to recover one half of said judgment, after crediting the one hundred dollars paid to Wells; and judgment was taken for said moiety, by direction of the court, subject to the opinion of the court at general term. That court gave judgment for the plaintiffs, and the defendant appealed.

Henderson & Wentworth, for the appellant.

George Barker, for the respondents.

DENIO, J. I am of opinion that the plaintiffs ought not to have recovered judgment in this case. The real question is stated in the opinion given in the Supreme Court to be, whether, in the process of closing up the concerns of R. & B. Robbins, Reuben Robbins, one of the partners, had power to make a sale of, and to transfer the whole title to, the judgment against the defendant. If he possessed such authority, the power of attorney which he gave to his son, E. A. Robbins, under which the latter transferred the judgment in the first place to I. M. Knight, and afterwards to A. L. Wells, was a lawful exercise of the power which he possessed. If these transfers, or either of them, were valid acts, the plaintiffs were not entitled to recover, whatever effect may be attributed to the settlement which the defendant afterwards made with Wells. But it is found that Wright, one of these assignees,

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released the judgment, which release was delivered to the defendant; so that, upon the assumption that Reuben Robbins was authorized to transfer the judgment, it is now effectually discharged by that release, and no recovery can be had upon it in the name of any person.

During the continuance of the partnership, either of the copartners has full power to settle and compound debts, and to collect and dispose of the choses in action and effects belonging to the concern. If the partnership in this case had continued until the transfer of the judgment was made, under the power given by Reuben Robbins, no doubt could be entertained respecting his right to assign it. But the dissolution of the firm, though it annulled the powers of the respective partners for many purposes, and particularly as to the contracting of debts and the creating of obligations against the copartnership, did not put an end to their authority to administer the assets in accordance with the rights and interests of the parties interested in them, and with the intention of the partnership enterprise. For this purpose the partnership is considered as continuing. It was competent for the partners, by the act of dissolution, to constitute one of their number the special agent for winding up the joint concern. Where they do this, parties who, with notice of the arrangement, deal, in matters connected with the liquidation, with the partners not thus intrusted, are subject to the equitable rights of the other partners. But there must be some one to adjust the affairs of the concern, by collecting its debts and disposing of its property, and dividing the proceeds among the parties entitled; and where, as in this case, none of the parties are specially empowered for this purpose, to the exclusion of the others, the individual partners retain the same authority which they possessed before the dissolution, so far as it may be necessary for such purposes. This position I consider well settled by authority. In the treatise on Partnership by Mr. Bissot, the cases are collected, and the conclusion which he arrives at is, that, "for the purpose of discharging the debts and liabilities of the firm, and giving to each partner his share

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of the residue, the partners may, notwithstanding the dissolution, still perform any act relating to debts and contracts existing before the dissolution, which they might have performed as partners before the dissolution; such as releasing or giving a receipt for a partnership debt, signing a bankrupt's certificate," &c. (Bisset on Part., 90.) The signing of a bankrupt's certificate is the highest exertion of authority referred to; for it releases the debtor and discharges his future acquisitions; but the power to do it is well established. In *ex parte Hall* (17 Ves., 62), a firm consisting of Langston & Hall proved a joint debt against a bankrupt estate. Afterwards the partnership was dissolved; and after that, Langston signed the bankrupt's certificate without the consent of Hall, who petitioned that effect might be withheld from it. Lord ELDON, after referring to the general power which one partner has to bind the other, added: "The only distinction in this case arises upon the intermediate dissolution; whether that makes a difference. As to that debt, the partnership was not dissolved. The debt was still due to both, and must remain, though nothing of the old concerns had been left but that debt." In *Arton v. Booth* (4 J. B. Moore, 192), a release of a joint debt was given by one of two partners after the dissolution, though the other partner, who challenged the release, was by the deed to receive and pay all debts due to and from the partnership; and the partner who gave it was not to interfere. A joint action for the debt was brought, and the defendant set up the release; upon which, the partner not signing it applied to the equitable jurisdiction of the Court of Common Pleas to set it aside; but the motion was denied; the court holding that no fraud was established, and that the defendant could not know that the other partner was alive to receive the amount under the deed of dissolution. In *Butchart v. Dresser* (81 Eng. Law and Eq., 121), it was held, that one partner was authorized, after the dissolution, to pledge or sell stock to raise money for the purposes of the partnership. The rule, as it has been stated, was laid down in very distinct language; and in *King v. Smith* (4 Carr. & P., 106), where,

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upon the dissolution, it was agreed that one of the partners should receive the debts due to the concern, it was held that the other partner might draw a bill upon a debtor of the firm for the amount of the debt. Lord TENTERDEN said that either partner might give a release of the debts due the late firm: *a fortiori*, he might receive these debts. The principle is illustrated in several other cases referred to in the book first mentioned, which need not be particularly stated. The principle has been repeatedly adverted to, and assumed to be the law in the courts of this State. In *Oram v. Cadwell* (5 Cow., 493), it was laid down by the chief justice that, where there is no stipulation between partners, each partner may, after the dissolution, receive the debts and give discharges; and in *Murray v. Mumford*, the rule is stated as follows, in the opinion of the court: "The dissolution of a partnership does not destroy the joint tenancy of the partners in the partnership property, and create a tenancy in common. They are still partners for the purpose of settling the partnership concerns, and until that is effected. For that purpose the partnership may be said still to continue with all the incidents belonging to that relation." (6 Cow., 441.)

But it is not necessary to enlarge upon this doctrine, for the opinion of the Supreme Court in the case under review assumes it to be established in the manner I have stated; but it is said that it was shown that all the partnership debts of R. & B. Robbins had been paid; and it is held that, where such is the case, the principle does not apply. I do not, however, see any reason why it should not. The debtor is not shown to have had any knowledge of this circumstance, or to have known how the accounts stood between the partners themselves. Indeed, nothing upon the latter point is disclosed by the evidence; and for aught that appears, Reuben Robbins, who disposed of the judgment now sought to be enforced, may, as between himself and his copartner, have been entitled to the whole interest in that debt. There is, no doubt, a presumption that the interest of partners in the original capital is equal, where nothing to the contrary is shown; but there is

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not, that I am aware of, any presumption as to the state of their respective accounts with the concern. The facts, as they were presented to the purchaser of the judgment, were that the judgment was recovered for a debt due to the Messrs. Robbins as copartners; and that there had been a dissolution of the firm. This circumstance did not of itself deprive the partner, with whom he dealt, of the power to dispose of the judgment at such sum as he should consider it worth; and as to any other facts which might change the situation or impair the power of the respective partners, he was unacquainted with them. My own opinion is, that the fact that the debts against the firm had all been discharged, would not affect the question where the accounts between the partners were not shown to have been adjusted, though the person dealing with the single partner were acquainted with the fact; but certainly the authority of each partner, in regard to matters of liquidation, would continue in respect to persons who were unacquainted with the fact that no indebtedness of the firm existed.

I am therefore in favor of reversing the judgment of the Supreme Court, and awarding a new trial.

SMITH, J., delivered an opinion to the same effect in respect to the general authority of partners after dissolution, concluding thus: The right of the respective partners, after dissolution, to collect or discharge the debts of the copartnership, cannot depend upon the state of the accounts between the partners. Third persons cannot know the state of such accounts, and cannot be required to ascertain, at their peril, whether the partnership debts are or are not paid. The court below erred in giving judgment upon the verdict for the plaintiffs, and the same should be reversed, and judgment given for the defendant.

WRIGHT, SUTHERLAND and GOULD, Js., concurred.

DAVIES, J., (dissenting.) This suit is in the name of both partners, but is prosecuted solely by Barna Robbins, and for

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his benefit. Reuben Robbins has, clearly, no interest therein, having sold and transferred, at any rate, his moiety of the judgment, and, in so doing, assumed to act for the firm and in its name. He also assumed to sell and transfer the other moiety belonging to Barna Robbins. The question to be decided in this case is, whether one partner, after the dissolution of the partnership and the payment of the partnership debts, can sell and assign the partnership property without the knowledge or consent of the other partner. It is undeniable that he can sell his own interest, whatever it may be; but whence does he derive his authority to sell the property which undeniably belongs to his former partner? Certainly not from any rights growing out of their relation as partners, for these are terminated by the dissolution. Not, clearly, from any implied authority which one partner has, even after dissolution, to sell or transfer the partnership property for the purpose of or in payment of the partnership debts; for here there were no partnership debts to pay. It has been regarded as settled law in this State since the decision in *Sanford v. Mickles* (4 John., 224), in 1809, that one partner, after dissolution, has not the power to transfer the partnership property. It was distinctly ruled in that case that all the partners must join in the transfer of a bill negotiated after the dissolution for the purpose of vesting the title in the indorsee. The same principle is affirmed in *Geortner v. The Trustees of Canajoharie* (2 Barb., 625). These rules are in harmony with the general law of partnership, by which the act of each partner, during the continuance of the partnership, and within the scope of its object, binds all the others. Each party acts as agent of the firm, and the acts of the agent, within the scope of his agency, are binding upon the principal. It is in this sense that the act of each and all results from a general and mutual delegation of authority. Each partner may, therefore, bind the partnership by his contract in the partnership business, but he cannot bind it by any contract beyond those limits. A dissolution, however, puts an end to the authority. By the force of its terms it operates as a revocation of all power to create new contracts; and the right of

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partners as such can extend no further than to settle the partnership concerns already existing, and to distribute the remaining funds. The acts of a partner, beyond this, cannot bind the partnership, any more than the declarations, acts or acknowledgments of any other agent of the partnership would do, after his agency had ceased. (Story on Part., § 328.) All the power, therefore, which every partner possesses upon the dissolution is, to pay and collect debts due to the partnership; to apply the partnership funds and effects to the discharge of their own debts; to adjust and settle the unliquidated debts of the partnership; to receive any property belonging to the partnership; and to make due acquittances, discharges, receipts and acknowledgments of their acts in the premises. (Story on Part., § 328.) This enumeration does not embrace the power to sell and transfer the partnership property or securities after the payment of its debts and the settlement of its affairs. Such power must, therefore, be held to be excluded. The maxim, "*expressio unius, est exclusio alterius*," may be invoked as applicable here.

It follows that the judgment of the general term is correct, and should be affirmed.

ALLEN, J., also delivered an opinion for affirmance. He said, among other things: The agency of the partners only continues as to acts necessarily incident to the closing up of the partnership affairs, and the payment and receipt of the partnership debts. The disposal of the partnership assets, in payment of the liabilities of the firm, is within the power thus continued in each of the partners. But the authority to appoint an attorney to act for the firm is not a necessary incident to the power actually existing. It is not necessary to the exercise of that power, and, therefore, does not exist. E. A. Robbins was not, therefore, the agent of the firm, and had no authority, by the transfer of the judgment, to bind any one but Reuben Robbins, from whom he derived his authority to act. The defendant, having knowledge of the dissolution of the firm, cannot, on any ground of implied agency, claim to

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held Barna Robbins bound by the act of Reuben Robbins or his appointee, E. A. Robbins. He is chargeable with notice of the defects in the power of each to act for Barna.

Had Reuben Robbins executed a formal release, the question would have been different. By the technical force of the release by one of two joint obligees, or creditors, an action upon the demand released will be barred. But this is for technical reasons not affecting this action, where no release was given. If a release had been given, it could only have been set aside for fraud. The agreement to receive, and the receipt of, the small sum of one hundred dollars in full of the judgment, did not bind Barna Robbins, who did not assent to it. The judgment below was right, and should be affirmed.

Judgment reversed, and new trial ordered.

ORCUTT v. CAHILL et al.

The return of a justice of the peace to a certiorari, under the Code, must contain all the testimony received by him.

Where a justice's return sets forth evidence in detail, it is to be considered as stating the whole testimony, unless the contrary distinctly appears.

APPEAL from the Supreme Court, in which a judgment of the County Court was affirmed.

Amasa J. Parker, for the appellant.

John H. Reynolds, for the respondents.

DENTO, J. The action, which was brought in the court of a justice of the peace, was trespass for the taking of five calves; and the defendants justified under a warrant issued by one of them as a justice of the peace for the collection of a small sum for the costs of a proceeding against the plaintiff and another person under the statute concerning encroachments in highways. (1 R. S., 521.) It appeared that an issue had been

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formed in that proceeding by the denial of the complaint by the present plaintiff, and that the jury summoned on that occasion found the fact of the encroachment and made the certificate thereof required by the statute, and that thereupon the justice issued the warrant, under which the defendants justified, to collect these costs. But it was shown that, before the seizure of the calves, the plaintiff had sued out a certiorari to remove the proceedings on the complaint for an encroachment into the Supreme Court; and it is not denied that this writ operated as a stay of these proceedings, nor that the service of the warrant subsequently was illegal. The defendant Cahill was one of the commissioners of highways, and it was proved that he directed the constable who had the warrant to go on and collect the money mentioned in it. The plaintiff claimed that the defendant Warren had also made himself responsible for the trespass; but the evidence was not conclusive upon that point. The magistrate discharged four of the six defendants before the case was submitted. These were, the justice, the constable, and two of the commissioners of highways. Cahill and Warren were two other commissioners of highways; four commissioners, being those chosen for two towns, having joined in promoting the encroachment proceedings on account of the highway being the boundary line between the towns. The justice took time to deliberate, and afterwards gave judgment in favor of the remaining defendants, Cahill and Warren, and this judgment was affirmed in the County Court expressly on the ground that all the evidence before the justice had not been returned.

Upon the evidence returned, the defendant Cahill was unquestionably liable in the action. After the service of the certiorari upon all the parties who were concerned in prosecuting the encroachment proceedings, that defendant directed the constable to proceed to execute the warrant, and he accordingly seized the property in question. It is said that the direction was not to take this particular property, and that is true; but it was illegal to take any property on that precept, the force of which was suspended by the certiorari; and the general

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directions which the defendant gave embraced any property of the party named in the warrant which would have been subject to be taken if it had not been superseded by the certiorari. The defendant was, therefore, upon this testimony, implicated in the trespass.

The only question which can be made is the one argued by the defendants' counsel, namely, that it does not appear by the justice's return that all the evidence is set forth; and in such a case it is urged that a judgment cannot be reversed upon the facts, because it may be that, if all the evidence had been stated, a defence would have been established. I do not think the position can be sustained. The provision of the Code of Procedure bearing upon the subject is section three hundred and sixty, which makes it the duty of the justice to make a return to the appellate court "of the testimony, proceedings and judgment, and file the same in the appellate court," &c. In obedience to this direction, the return under consideration professes to set out the testimony given on the trial. It states that the plaintiff, to maintain his action, called a person who is named as a witness, and whose testimony on direct and cross examination is then given; and this is followed by the statement of the calling and examination of another witness whose testimony is also given, and then it is said that the plaintiff rested. The defendants' testimony is then set out in the same way, and then this remark is made: "*The testimony here closed.*" It is not said in so many words that what is thus given is all the testimony produced in the case; but if we read the return in connection with the law pursuant to which it was made, I think it would be excessively hypercritical to say that it does not sufficiently appear that all the testimony is stated in the return. Indeed, I think that a justice's return under this act, setting out testimony in detail, should be understood as stating the whole of the evidence, unless the contrary distinctly appears; and such is the judgment of the court.

We are aware that a different rule was established under a former statute, providing for a review of the judgments of justices of the peace upon certiorari. (*Low v. Payne*, 4 Comst.,

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247.) But that act did not require all the testimony to be set out in the return. The party seeking the review was to make an affidavit setting forth the substance of the testimony and proceedings before the justice, and the grounds upon which an allegation of error was founded. Then the return was required truly and fully to answer to all the facts set forth in the affidavit. (2 R. S., 256, §§171, 177.) This provision might warrant a return containing only a general statement of the effect of the evidence upon the points respecting which error was alleged, and then it would be unfair to require that the judgment should be supported in all its parts by the evidence returned, there being no statement that it was all the evidence which had been given. A provision expressly directing that the evidence shall be returned, means that all the evidence shall be stated; and a return setting forth the names of the witnesses, and what they swore to in detail, must be taken to set forth all the evidence, and an express statement that no more was given is unnecessary. The Supreme Court in the third district came to a similar determination in the case of *Calligan v. Mix*, reported in 12 Howard's Practice Reports (p. 495), upon grounds similar to those which have been here stated.

The three judgments, in which this small claim has been hitherto adjudicated, must be reversed.

GOULD, J. There has been no case in this court calling for a decision of the question whether (under the Code), upon an appeal to a County Court from a justice's judgment, where the return does not show evidence sufficient to sustain the judgment, and where the justice does not certify that his return contains all the evidence, &c., given and had before him, the appellate court will, in support of the judgment, presume that there was other evidence sufficient to warrant the judgment. The case cited from 4 Comstock (p. 247), is not in point, as that case was taken up by the old form of certiorari.

By the statute regulating proceedings under that writ (2 R. S., 8d ed., p. 851, § 181), it is provided that the justice, in his

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return, "shall truly and fully *answer to all the facts set forth in the affidavit on which the certiorari was allowed.*" And under this provision it was presumed that a party, when he made his affidavit, covered all the ground he intended to assign as error, and that, if the want of sufficient evidence was a ground for the writ, he would say so, and have the return (by amendment enforced when necessary), in such a shape as to be available, by stating that it contained all the evidence.

Under the Code (§ 353), an appeal is provided for, which is taken by a notice to the justice and the other party that the appellant appeals to the County Court, and thereupon the justice shall make a return "*of the testimony, proceedings and judgment.*" It is true that the notice of appeal must state the grounds of the appeal. But this does not vary the duty of the justice, which is, to return the testimony, &c.; plainly meaning the whole testimony, &c. And the legal presumption is, that a public officer does his duty. If it be said that the law allows the appellant to procure an amended return, in which the justice shall state that he has returned all the testimony, it may be answered that the appellee may procure an amended return containing all the testimony, if there be an omission of any that would sustain his judgment. And whenever the return is complete (whether with or without an amended return), it is to contain, and by law does contain, the testimony, &c.

In the case before us, the notice of appeal states the ground of appeal to be, "that the judgment is *against law and evidence*, and the plaintiff should have had judgment against the defendant." This is abundant notice to return all the testimony, were any notice necessary. But none seems to be required.

The judgments should be reversed.

Judgments reversed.

THE PEOPLE, ex rel. BARNES, v. GARDNER.

The canal board, upon reversing or modifying an award of the canal appraisers, must state the grounds of reversal or modification in their resolution. The statute (ch. 752 of 1849, § 4) is imperative, not merely directory.

The offering by one of the canal commissioners, at a meeting of the canal board, of a resolution, in writing, that an appeal be reheard, is an application in writing for such rehearing.

APPEAL from an order of the Supreme Court, awarding a peremptory mandamus. In September, 1849, the canal appraisers made an award to the relator for \$8048.35 for damages from the appropriation of his land and waters. Appeals were taken on behalf of the canal commissioners, representing the State, and also by the relator. On the 28th December, 1859, the canal board adopted a resolution adding \$4,010 to the award. The resolution simply directed this increase, without recital or statements of any facts or grounds for thus modifying the award. At the time of its passage, the appeal was not on the business calendar of cases to be heard, nor had notice been given of any special meeting for the hearing of calendar cases, as required by the regulations of the board. Mr. Gardner, the commissioner in charge of the section of the canals on which the damages were incurred, was absent from the meeting. On the 3d day of January, 1860, Mr. Gardner, at a meeting of the canal board, presented a resolution in writing, reciting the foregoing facts, vacating the resolution of December 28, ordering a rehearing of the appeal, and directing a copy of the resolution to be served on the relator. This resolution was laid upon the table, but, subsequently, on the 10th February, 1860, was taken up and passed. The relator, regarding this last resolution as nugatory, applied to Mr. Gardner to draw his draft on the auditor for the canal department for the award, as increased by the resolution of December 28, 1859. Upon his refusal the relator obtained a mandamus, which was

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made peremptory upon the hearing at special term; and the order having been affirmed at general term in the third district, the defendant appealed to this court.

John H. Reynolds, for the appellant.

Henry Smith, for the respondent.

SMITH, J. The canal board is clothed with certain judicial powers. It is authorized, upon appeal, to review the decisions of the canal appraisers, and reverse or affirm, or modify their appraisements. (1 R. S., 5th ed., p. 597, § 106; Laws of 1822, ch. 363, § 3.) The board is composed of administrative officers, and is entitled to exercise no judicial functions except those specially and distinctly conferred by some legislative act. The rules of law applicable to inferior magistrates or courts of special and limited jurisdiction apply to it. These rules are, that nothing shall be intended to be within their jurisdiction; and that the authority for all their acts must appear upon the face of their proceedings, or must be affirmatively and distinctly shown. The papers presented to the court below, and upon which the motion for a mandamus was made and granted, do not show upon their face that the canal board ever acquired jurisdiction to pass the resolution increasing the amount of the relator's award from \$8,048.35 to \$12,058.35. The resolution itself proves nothing. The affidavit of the relator shows the making of an award by the canal appraisers, and the appeals therefrom by himself and the canal commissioners, but does not show that any return was ever made to such appeal by the canal appraisers. Until the making of such return, the canal board had no jurisdiction upon the appeal. The affidavit of the respondent shows that, at the time of the passing of said resolution, the said appeal was not on the business calendar of cases to be heard before the said board, and no notice of any special meeting of the board for the hearing of the calendar cases, as required by its regulations, had been given. Whether cases are immediately placed upon such calendar, on the filing of the return of the ap-

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praisers to the appeal, does not appear. If such be the practice, such allegation implies that no return had been made. We can intend nothing on the subject; and the relator, whose duty it was to show affirmatively that the proceedings of the canal board were duly authorized, has not shown how the facts were. Upon this ground, I think the mandamus might have been denied. But this is perhaps a matter of nice formality; and a decision on this ground would not dispose of the case upon its merits. I will, then, consider the more substantial ground upon which I think the judgment below should be reversed.

The statute (ch. 752 of 1849, § 4, p. 513), prescribing the duties of the canal board, provides as follows: "Whenever the canal board shall, upon the hearing of any appeal from the award of the canal appraisers, reverse or modify such award, *they shall state in the resolution or order relating to said appeal the grounds of such reversal or modification, and how much, if any, such award is increased or diminished.*"

Confessedly, upon its face, the resolution passed by the canal board, December 29, 1859, in respect to the claim and award of the relator, does not comply with this statute. It simply increases such award by adding thereto the sum of \$4,010, making it \$12,053.35. It specifies no ground for such increase or modification. It is claimed that compliance with this provision of the statute is unnecessary; and upon the ground that it is merely directory, and not imperative. I cannot think that the provision, requiring the canal board to specify the grounds of their decision in the resolution modifying an appraisement of the canal appraisers under the section above mentioned, can properly be regarded as merely directory. It seems to me that it is matter of substance, and essential to the validity of any decision of the board in such cases. Such was, doubtless, the intent of the legislature. The language is positive and peremptory. It is, "*they shall state in the resolution or order the grounds of such reversal or modification.*" Such statement is an essential and indispensable part of the order or resolution. The legislature has pre-

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scribed the form of the order in such case. It has prescribed the mode in which the assal board shall act, the form of its judgment. The board has no power to give any other judgment, or a judgment, in any other form. It has no general powers. It is specially authorized to affirm, reverse, or modify an award in a particular prescribed way and form. It must comply with the form. It cannot depart from the form specially prescribed and defined. To do so, is to act without authority, and the act is not valid. It is quite like the case of *Davidson v. Gill* (1 East, 64). In that case, an act authorized certain magistrates to stop up and alter a ford way, &c. The statute directed that the proceedings should be in a particular form, and prescribed a schedule of forms. The magistrates had not followed the prescribed form; and it was claimed that the statute was simply directory. But Lord KENYON said: "I cannot say that the words are merely directory. Power is given to the magistrates to take away, on certain conditions, a right which the public before enjoyed; and this is to be done in a certain prescribed form." He said, "the words of the act are peremptory, that the forms shall be used," &c. Provisions in statutes are in very many cases, and properly, held to be directory. But such provisions are commonly merely incidental or collateral, relating to ministerial or clerical acts, and not to those which pertain to the essence and substance. In *Rex v. Lonsdale* (1 Burr, 447), Lord MANSFIELD said: "There is a known distinction between circumstances which are of the essence of a thing required to be done by an act of parliament, and clauses merely directory." In *Marchant v. Langworthy* (8 Hill, 846), it was held, in accordance with this distinction, that a provision of the statute requiring the clerk of the town to give notice of the annual meeting was merely directory. In *The People v. Allen* (8 Wend, 486), where the statute required the commanding officer of a brigade to appoint a brigade court-martial on or before the first day of June in each year—held, that the time was not an essential part of the provision, and the statute was directory. So in *ex parte Heath* (8 Hill, 48), *The People v. Helly*

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(12 Wend., 481), and *Jackson v. Young*, (8 Cow.), where the statute required certain acts to be done within a certain time — held, that the time was not essential to the validity of the act; and the statute in that particular was directory merely. So in respect to the tax list, directed by the statute to be made out within thirty days after the district meeting. It has been held in several cases that the acts being for the public benefit, and the signing of the warrant but a ministerial duty, the statute in respect to time was merely directory. (*Hovey v. Clapp*, 20 Barb., 167; *Gale v. Mead*, 2 Denio, 160; *Lee v. Parry*, 4 Denio, 125.) In *Striker v. Kelly* (7 Hill, 9), the question was considered, among others, whether a resolution for opening a street in New York city was properly passed without calling the ayes and noes; the statute requiring such formality in express words. The statute directed that "all resolutions recommending improvements should be published in all newspapers employed by the common council; and whenever any vote is taken in relation thereto, the ayes and noes shall be called and published in the same manner."

Judge BEARDSLEY considered that this provision was directory only; and with him Judge COWEN concurred. And in respect to the publication in the newspaper, the Chancellor concurred in the view that that portion of the statute was directory in *Wiggin v. The Mayor of New York* (9 Paige, 16). But in the case of *Striker*, Judge BRONSON dissented, saying: "The language is *imperative*; the ayes and noes *shall* be called. When the particular mode in which the corporation is to act is thus specially declared by its charter, I think it can only act in the prescribed form. The contrary doctrine wants the sanction of legal authority, and is fraught with the most dangerous consequences. It would place the corporation above the laws." This case was reversed in the Court for the Correction of Errors upon other grounds; and this question was not passed upon (2 Denio, 823); and the point remains undecided. But the views expressed by Judge BRONSON seem to me eminently sound; and they are equally applicable in this case. If the canal board can omit to comply with this

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provision of the statute, they will virtually nullify the law; as Judge BRONSON said of the common council of New York, "it would place the board above the laws." It was never the intention of the legislature that the canal board should have power arbitrarily and capriciously to reverse or modify awards. This section was made, most palpably, to prevent such action of the board; and it is the plain duty of the courts to seek to carry out the plain intent of the statute, and avert the mischief it was intended to prevent.

It appears, from the affidavit of the relator, that the resolution in question was passed in his absence, relating to matters within his particular district of the canal, and in respect to which it was his particular duty to watch for and guard the interests of the State: the appeal was not on the calendar of cases to be heard upon appeal; and no special meeting of the canal board for the hearing of appeal cases, according to the regulations of the board, was given. These matters pertain, doubtless, to the practice of the board, and are not subjects of review any more than ordinary questions of regularity in courts of justice. But they do suggest the importance of the statute in question, and vindicate the wisdom of the legislature in its passage; and clearly show that the power of the board should not be enlarged by judicial construction tending to defeat the legislative will, and jeopardize the public interests.

The resolution of the 29th of December, 1859, increasing the award of the relator to \$12,053.85, I think, therefore, is clearly invalid, for the non-compliance by the canal board with the statute in question. The resolution passed on the 10th of February, 1860, vacating the former resolution and granting a re-hearing of the appeal, is also invalid. The board could not grant a re-hearing, except in the precise mode specified in the statute (§ 150), and upon an application in writing. This application means an application upon affidavit or petition, showing some mistake or other grounds of error, and made on notice to the opposite party. The order is therefore invalid, as an order granting a re-hearing of a decision properly made upon an appeal. As a resolution, vacating an irregular order, it is

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not, perhaps, objectionable. It is at best harmless, and affects no rights of the people or of the relator. It simply removes the irregular order from the record, so as to allow the appeal to be heard upon its merits. It should so be heard, without respect to such order; never having been properly decided if heard.

The judgment below should be reversed.

All the judges were for reversal; and a majority of them concurred in opinion that the statute requiring the canal board to state the grounds for its modifying an award was imperative.

DENIO, J. I assume that the order of the canal board of the 29th December, 1859, was legally valid, although it did not set forth, as the act requires, the grounds of the change which the board had made in the award of the canal appraisers. I am inclined to think the provision in that respect may be regarded as directory, as was held by the Supreme Court. But the board had a clear right, under the act of 1840 (ch. 201), to grant one rehearing, and it was their duty to do so, if, in their judgment, the justice of the case required it. The board did grant a rehearing by its order of the 10th January, 1860, and that order was a complete answer to the application for a mandamus to carry into effect the award of damages made by the board on the 29th December preceding, unless it was void. It is alleged that it was void for several reasons, the first of which is that it professes to vacate the former resolution upon an *ex parte* application and before the party claiming damages had been heard. The analogy between these proceedings and suits and proceedings in courts of law is not very close; but some general principles are, no doubt, applicable to both, and it would be clearly illegal to finally annul a determination made upon a hearing of the parties, under which one had acquired rights, without affording him an opportunity to be heard upon the question. But such was not the course proposed by the board. It had been suggested by the canal commissioner, whose duty it was to attend to the

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interest of the State in the matter, that justice required a further examination of the case; and the effect of their determination was that an opportunity should be afforded for such further examination, and of this Mr. Barnes was to have ample notice by the service upon him of a copy of the order. The statute does not require that the party who had prevailed upon the former hearing should have notice of the application for a rehearing; and there is nothing in the nature of the case making it indispensable that such notice should be given. If he has a full opportunity to appear and contest the matter on the further hearing, he has no ground for complaint. Besides, it is to be intended that the act has imposed all the conditions to obtain a rehearing which the legislature thought it suitable to impose. It declares that there shall be an application, and that it shall be in writing. Of course, the only party to whom an application can be addressed is the board. Then the application must be made in sixty days after the adjudication which is sought to be reconsidered. If, besides these formalities, it had been intended that notice should be given to the other party, it is to be presumed that it would have been so specified. If there was an error in declaring the former resolution vacated before the rehearing took place, still that would not prevent the rehearing, but would be in furtherance of it. So far as the order professed to set aside what had been done, it might be void, and yet the mandate for a rehearing, being within the competency of the board, might be legal and valid. But I think the *vacatur* was right. The nature of a rehearing, stripped of all technicalities, is a proceeding by which the complaint, or claim for the original adjudication, is to be again heard and considered. The matter, in such a case, is to be taken up anew, without prejudice on account of the former order. The order is in the nature of an award of a new trial in an action at law, which presupposes that the original trial has been vacated and annulled.

But the objection most strongly urged to prove the order for a rehearing void is, that there was no written application. My opinion is, that the board was competent to waive that

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formality, and that, by making an order in writing vacating the former order and directing a rehearing, the board did effectually waive all objections to the manner in which the question was brought before them. The application was required to be made to the board, and not to the opposite party. The motive for requiring a written application, and for limiting the time within which it should be made, was, doubtless, to enable the board, the public officers and the claimant to know when the original adjudication had become perfect and absolute. It was important, after the sixty days mentioned in the act had elapsed without any rehearing being granted, that there should be some authentic means of determining whether an application had been made within that time. If an oral application should have been made, more or less uncertainty would have arisen as to its existence, which would not be likely to be the case if a written application was the only manner in which the motion could be made. But these reasons have no force where the board has entertained the application, and has actually made an order in writing for a rehearing within the sixty days. No better evidence could be needed that the party seeking a rehearing had applied to the board for that purpose, than a formal order granting the application and directing a rehearing entered in their minutes. Again, the resolution was reduced to writing and presented to the board by the canal commissioner who applied to open the adjudication. It set forth the order which he asked for, and recited the reasons why it should be granted. It was in itself an application in writing, and would alone be a sufficient answer to the objection.

These proceedings are administrative in their character, and the statutes regulating them should be construed with liberality. I am satisfied that an order for a rehearing, made in the manner disclosed in these papers, entered within the sixty days, accomplishes all the objects of a written application, so far as the party opposing the rehearing is concerned.

I am, therefore, of opinion that the judgment of the Supreme Court should be reversed, with costs, and that judgment

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should be rendered in favor of the canal commissioners against whom the alternative mandamus was sued out.

ALLEN, J., concurred in this opinion; and a majority of the judges agreed that the offering of the resolution by Mr. Gardner was a sufficient application in writing.

Judgment reversed, and judgment for the defendant ordered.

BOOTH v. BUNCE et al.

A creditor in good faith of a manufacturing corporation which was organized, and its business conducted, for the purpose of defrauding the creditors of its president, has no priority of claim to property in the possession of such corporation over a creditor of the president.

The purchaser of goods of the corporation under execution against its president, for his private debt, gets a good title as against a subsequent execution against the corporation.

APPEAL from the Supreme Court. Action for taking a steam-engine, the property of the plaintiff. Upon the trial it appeared that, on the 1st day of January, 1855, William Montgomery and one Garra-brant made their promissory notes for two thousand dollars, the consideration for which was the sale to them by one Reeve, the payee, of his interest in a machine-shop and its business, which, up to that time, had been carried on by the three, at Yonkers, in Westchester county. The plaintiff, having become the owner of these notes, recovered judgment thereon in December, 1859. Under the execution upon this judgment he purchased the steam-engine in question, which was then in the machine-shop at Yonkers. The plaintiff removed the engine to the city of New York, where some two months afterwards it was seized and taken away by the sheriff, at the instance of the defendants, under an execution upon a judgment recovered by them against the New York

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Steam Saw-Mill and Machine Company. It was shown that this was a corporation organized under the general law of October 30, 1857. Montgomery, the president of the Company, and one Lund, who was then in partnership with him, were trustees of the corporation. They owned the machine-shop, machinery and stock at Yonkers, which they transferred to the Company at the time of its formation. The plaintiff offered to prove that the corporation was organized to defraud the creditors of William Montgomery & Co., and that the business was carried on in the name of said Machine Company for the like purpose. The evidence was excluded, and the plaintiff took an exception. The court dismissed the complaint, and the judgment having been affirmed at general term in the second district, the plaintiff appealed to this court.

R. W. Van Pelt, for the appellant.

Andrew Thompson, for the respondents.

SUTHERLAND, J. The principle plainly announced in the opinions delivered at the general term, on both occasions when this case was before them, is: Assuming that the plaintiff was a creditor of William Montgomery, or of William Montgomery & Co., at the time the New York Steam Saw-Mill and Machine Company was formally organized as a corporation under the statute; and that it was so organized, and the business carried on in its name, to defraud the creditors of William Montgomery, or of William Montgomery & Co.; yet that Bunce & Co. had the best or superior right to the engine in question, or to sell it under their judgment and execution, because the corporation was regularly organized, and they became its *bona fide* creditors without notice of the fraudulent purpose for which it was organized, the property of William Montgomery, or of William Montgomery & Co., transferred to it, and the business subsequently carried on in its name.

It does not appear to have been doubted, by either of the learned judges who delivered the opinions at general term, if

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the corporation was organized and the business subsequently carried on in its name with the fraudulent purpose aforesaid, that such organization or proceeding was absolutely void as to the plaintiff, and that he had a right, at the peril or risk of being able to establish such fraudulent purpose, to sell the engine in question, or, at least, Montgomery's interest in it, under his execution; and that his prior sale and purchase under his execution gave him a title as against any creditor of William Montgomery, or of William Montgomery & Co., and would have given him a superior title as against Bunce & Co., had they dealt with and given credit to the corporation with notice of such fraudulent purpose. But the principle assumed in these opinions would appear to be, that, the *bona fide* creditors of a corporation, organized, and the business of which is carried on by A. B. in its name, to defraud his creditors, have a right to property held by him in the name of the corporation superior to that of a defrauded creditor of A. B.; that the mere fact of the regular organization of the corporation gives its *bona fide* creditors a lien on, or a right to, such property, which no superior diligence of a defrauded creditor, in enforcing the payment of his debt by judgment and execution, can deprive them of.

No authority is cited in support of this principle, and we do not see any ground or reason for enforcing it in this case.

Assuming, in this case, that the corporation was organized, the property of William Montgomery, or of William Montgomery & Co., (we do not mean the particular property in question,) transferred to it, and the business afterwards carried on in its name, with the fraudulent purpose of preventing the plaintiff enforcing or collecting his debt, and that Bunce & Co. were *bona fide* creditors of the corporation, we think that, prior to the levy and sale under the plaintiff's execution, the equities of the plaintiff and of Bunce & Co. were equal.

There is nothing in the case to show that Bunce & Co. gave credit to the corporation because it was a corporation, or, in form and name a corporation. From aught that appears, Bunce & Co. would have as readily have given the credit,

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had the business been carried on in the name of William Montgomery, or of William Montgomery & Co. Indeed, it appears that, prior to the formal organization of the corporation, Bunce & Co. had dealt with William Montgomery & Co., and given William Montgomery & Co. credit for a considerable sum.

The question in this case is, not what disposition should or would have been made of the property held in the name of the corporation in a proceeding against it as insolvent. The question is between judgment-creditors enforcing, or trying to enforce, the payment of their judgments at law, by execution. The equities of the parties being equal, why does not the maxim, *Qui prior est in tempore, potior est in jure*, apply?

The plaintiff first levied on and sold the property in question. He did this, claiming that the organization of the corporation and the carrying on of the business in its name was fraudulent and void as to him. He sold it at the peril and risk of being able to prove the fraud; but if he can prove it, why does not his superior diligence, in accordance with the maxim cited, give him a good title?

The judgment of the Supreme Court should be reversed, and a new trial ordered.

Judgment reversed, and new trial ordered.

CLARK v. GRIFFITH *et al.*

In an action, under the Code, for damages for the conversion of a billiard-table, the plaintiff is entitled to recover upon proof of the detention of four tables, assumed to be of equal value, to *some* one of which the plaintiff had title, though the particular one had in no manner been designated, except upon the notion that the defendant must have taken some three of them before removing the fourth, and thus selected those three as his own.

APPEAL from the Superior Court of the city of New York. The action was for the conversion of one billiard-table, with

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the balls, cues, and counters, alleged to be the property of the plaintiff. The defendants justified under a chattel mortgage; and the facts were as follows:

On the 25th August, 1855, the defendants sold to a certain Dean & Finnegan four billiard-tables and apparatus, for \$1,100; for the payment of which, they took from the purchasers eleven promissory notes of \$100 each. One of them was made by a surety, and the other ten by the purchasers, and these were payable, the first at the end of two months, and the others at the end of each month afterwards. The purchasers also executed to the defendants a chattel mortgage on the articles purchased, conditioned for the payment of the notes. At the foot of the bill of sale there was an agreement signed by the defendants in the following words, upon which the question in the case mainly turns: "After three hundred dollars have been paid of said notes, then we, Griffith & Decker, are to give a receipt in full for one table, and so continue until all paid." Prior to the 14th day of January following (1856), three of the notes had been paid, namely, the first two falling due of those made by the purchasers, and the one made by the surety, making three hundred dollars in all, and on that day the defendants gave Dean & Finnegan a receipt as follows: "Received from Dean & Finnegan two hundred and seventy-five dollars for one billiard-table; said table being one of the four tables included in the mortgage given by said Dean & Finnegan." The plaintiff claimed title under Dean & Finnegan, and showed that, on and prior to the month of April, 1856, they had purchased the interest of both these persons in all the tables. On the 14th March, 1856, others of the notes having become payable, and being unpaid, the defendants elected to consider the whole debt as having become payable, pursuant to a provision in the mortgage giving them that right in case any of the notes should not be paid at maturity; and they seized and sold the tables, &c., and themselves became the purchasers. The plaintiff demanded one of the tables of the defendants on the 8th September following, and, not obtaining it, he brought this action soon afterwards. The evidence of the demand and

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refusal was contained in the pleadings. The complaint was for converting a certain billiard-table and four ivory balls, &c.; and it alleged that on, &c., the plaintiff demanded the same of the defendants, who refused, &c. The answer did not controvert this allegation. It justified the taking under the chattel mortgage, and referred to the four tables as the property mentioned in the complaint, together with three other billiard-tables, &c.

After proof of the foregoing facts, the justice held the action not maintainable, and dismissed the complaint. The plaintiff appealed from the judgment of affirmance given at the general term.

A. R. Dyett, for the appellant.

John H. Reynolds, for the respondents.

SMITH, J. The bill of sale, or receipt, of the 14th of January 1856, gave to the plaintiff's assignors, Dean & Finnegan, an absolute title to one of the four billiard-tables. These tables had been previously delivered to Dean & Finnegan and were then in their possession. The property, the right of possession, and the actual possession, were thus united in Dean & Finnegan, and the purchase-money for one of the tables was fully paid. Nothing remained but to designate, select, or ascertain their particular table out of the four, to complete the sale. Until this was done, the vendees could not claim either of the four tables as their absolute property. They could not identify the table purchased, or treat either of the tables as the one actually embraced in the said bill of sale.

But the defendants were subject to the same disability in respect to their three tables. Their tables were not set apart, separated and distinguished. They had the right to take three of the said tables and sell them upon their mortgage, upon the default of the mortgagor.

I do not see, within the principle asserted by Judge COMSTOCK in *Kimbedly v. Patchin* (19 N. Y., 841), why the plaintiff's

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assignors might not, at any time, while the tables remained in their possession, have taken distinct possession of one of them and sold and delivered it, or converted it to their own separate use and benefit, and, when the defendants came to foreclose their mortgage, why they might not have taken any three of said tables, leaving one for the plaintiff. The tables appear to have been sold at the same price, and there is no proof or suggestion that they were of unequal value. Neither party, in that view of the facts, could complain of the other for the exercising of his legal right in taking the proportion of the property which belonged to him. If this be so, when the defendants proceeded to foreclose their mortgage, they had a right to take away only three of the tables. They admit in their answer that they took and carried away the said four tables, and caused the same to be sold and disposed of at public auction. When they thus took said tables from the possession of Dean & Finnegan, they had the right to select three of said tables, and the three which they first took into their possession then and there became, and were, by such act, thereafter their three of said tables — the three to which they were entitled. As they took the tables from the room or place where they were stored or deposited — and they obviously must have taken them separately and not at the same time — in legal effect they made their selection, from the four, of their three; and when they had taken and removed their three, they had no right to take the fourth. The fourth and last table, when they took and removed it, belonged to the plaintiff. It was thus separated from the defendants' three by their act; and the taking and removal of such fourth table was a clear trespass. The plaintiff might thereafter have maintained replevin for the table last taken possession of and removed by defendants. His title vested absolutely in this table immediately upon the exercise of the right of election so made by the defendants, and the sale was executed and thereupon consummated. Upon this view of the rights of the parties, there is no difficulty in sustaining this action. It is brought for one of these four tables. One was demanded of defend-

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ants. The demand was unnecessary. It was a conversion to take and remove the fourth table from the possession of Dean & Finnegan. It was a bald, naked trespass on their part to take it away and convert it to their use. The judgment should, therefore, be reversed, and a new trial granted, with costs to abide the event.

DENIO and ALLEN, Js., dissented.

Judgment reversed, and new trial ordered.

NOTE.—The complaint was for damages for the conversion of a *certain* billiard-table. According to the Reporter's understanding of the case, the court was of opinion that the complaint would have been good had it asked damages for an *uncertain* table, stating the facts which made it impracticable to designate which of the four tables was the one of which the plaintiff had been deprived. Proof of those facts entitles the plaintiff to his damages. Since, under the Code, it is immaterial whether the action would have, formerly, been labeled trover, or trespass, or trespass on the case, there is no objection to so amending the complaint in accordance with the proof as to show a good cause of action, though it would have fallen under one of those denominations, rather than under another one which the pleader seemed to have in mind, and which, though less appropriate, is not *inconsistent* in its allegations with what would have been the better pleading. See remarks of GOULD, J., foot of page 610 *post*.

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To corroborate the conductor on a railroad in respect to the time of the arrival of his train at a station, evidence is admissible that he made a contemporaneous memorandum, in compliance with a regulation requiring it; and the time-table regulating the running, stoppage, &c., of such train may also be proved.

So, also, evidence is admissible of the regulations of the corporation, and of the custom of its agents, in respect to giving notice to passengers of the necessity of their changing cars in order to reach a given station.

A passenger was pointed by an agent of the carrier to a train then standing in his sight as one which would convey him to Lyons. That train,

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after running one hundred and fifty miles, deflected to a branch road not passing through Lyons, but was followed an hour afterwards by another train which passed through Lyons. Held, that the passenger was in fault for being miscarried, if, at or before reaching the point of divergence, the carrier used such means as would have conveyed to a traveler of ordinary intelligence, using reasonable care and attention, information of the necessity of his transferring himself to the second train.

If the traveler, without fault on his part, passed the point of divergence, but was apprised of his error and requested to take a return train on which he would have been carried free, in season to have reached a train which would have carried him to Lyons without delay, his refusal to do so, and persisting in remaining upon the wrong train, renders him a trespasser, liable to ejection from the cars.

APPEAL from a judgment of the Superior Court of the city of New York, entered on the verdict of a jury. The action was for an alleged unlawful ejection of the plaintiff's intestate, Albert W. Page, from the cars of the defendant. After the appeal to this court, the original plaintiff, Page, died, and his administrators were substituted in his place. At Syracuse, the defendant's road divides into two branches, one called the "old road," going by the way of Auburn to Rochester, and the other, called the "new road," going by the way of Lyons to Rochester. On the 8th of October, 1855, Page, who resided in Brooklyn, purchased a ticket at Albany over the defendant's road for Lyons, and took the train which left Albany at half-past six o'clock in the morning. At this time two trains left Albany in the morning — one at 6½ and the other at 7½ o'clock. The train leaving at 6½, from Syracuse went by the old road; the train at 7½ by the new road. The train leaving at 6½ A. M. arrived at Syracuse at 12 at noon, and left immediately by the old road. The train leaving at 7½ A. M. arrived at Syracuse at 1 P. M., and left at 1.35 P. M. by the new road. Page, instead of leaving the cars in which he took passage at Albany at Syracuse, and waiting there for the 7½ o'clock train, proceeded on from Syracuse by the 6½ o'clock train, until he was removed forcibly from the cars by the conductor and other employees of the defendant, at Vienna, after refusing to pay additional fare.

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The defendant assumed to justify this forcible removal on the ground that, at and before reaching Syracuse, Page had been notified in the usual way to leave that train at Syracuse, and take the 7 $\frac{1}{4}$ o'clock train on its arrival for Lyons, and also on the ground that the conductor, soon after leaving Syracuse and between there and Marcellus, the first station, and about ten miles from Syracuse, told Page to change cars at Marcellus and go back to Syracuse by the train which would be met there going the other way, and that if he did so he would reach Syracuse in time to take the 7 $\frac{1}{4}$ o'clock train from Albany, for Lyons. Upon the trial the defendant gave evidence tending to establish these facts; and also the fact, that a train was met at Marcellus which Page might have taken and reached Syracuse in time for the 7 $\frac{1}{4}$ o'clock train from Albany; and that it was customary to carry passengers back free of charge under such circumstances. Page, who was sworn as a witness on the trial, testified that when he bought his ticket at Albany, a few minutes before 6 $\frac{1}{4}$ o'clock, he asked the ticket agent what train he should take for Lyons, and that the agent pointed to the train he did take. Another witness testified that he heard this question, and saw the ticket agent answer by pointing to the train. There was no contradictory evidence as to this fact. Page further testified that the train arrived at Syracuse at a quarter to 12 o'clock, noon; that a man came to the door of the car and cried out, "This train stops twenty minutes for dinner"; that the train left there a few minutes past 12; that he heard no notice before or after arriving at Syracuse, or while there, that passengers for Lyons should change cars at Syracuse; that he did not learn in any way that he had to change cars there. Page also testified that he was not told by the conductor that he was on the wrong road until they had got twenty or twenty-five miles from Syracuse, and that he did not know he was on the wrong road until then; and that when so informed by the conductor he asked him why he had not told him at the first stopping-place, so that he could have gone back and got to Lyons the same day; that no offer was made to send him back to Syracuse

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unless he paid fare. The verdict of the jury was for the defendant.

John Graham, for the appellant.

Sidney T. Fairchild, for the respondent.

SUTHERLAND, J. The questions on this appeal are presented by exceptions taken by Page to the admission of certain evidence, and to the charge of the court, and to the refusal of the court to charge certain matters as requested.

The first exception was to the allowance of the evidence of Budd, the conductor on the train from Albany to Syracuse, in answer to a question asked him as to the regulations of the defendant in regard to the time-bill, or time-table, and entering the time of the arrival and departure of trains. His evidence in answer to this question was, in substance, that it was a regulation of the defendant that the time of the arrival and departure of a train should be noted down; that he accordingly noted down the time of the arrival of the train at Syracuse, and handed it to the conductor who took the train from him there; that the railroad time and the railroad clocks at Utica, Syracuse, &c., were regulated by the Albany time; that the 6½ o'clock train never stopped to dine at Syracuse, but the 7½ o'clock train did; that the time for the 6½ o'clock train to arrive and leave Syracuse was 12 o'clock, noon.

This evidence was, perhaps, not very material; but as Page had testified that the train in which he was a passenger arrived at Syracuse about a quarter to 12, and that notice was given that it stopped twenty minutes for dinner, and that it left there a few minutes past 12, and as Budd had previously testified that the train arrived at 11.55 A. M. precisely, I think the evidence was competent and proper.

The object of the evidence was, no doubt, to discredit Page by supporting or corroborating Budd.

It was certainly competent, with that view, to prove the fact that Budd made a memorandum of the time of the arrival

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of the train and handed it to the next conductor; and as to the evidence as to the regulations, &c., as Budd had contradicted Page as to the time of the arrival of the train, this evidence would tend to corroborate Budd upon the principle that the business of the defendant is a sort of public business, and their employees a kind of public officers; and that the presumption is that they would perform their duties according to the regulations of the business. (1 Greenl. Ev., § 40.)

Upon the same principle, I think, the exceptions to the allowance of the evidence of Budd, Hughes and Cotter, as to the regulations of the Company and the custom of brakemen as to giving notice to passengers to change cars, were not well taken.

It was a material question in this case whether such notice was given to Page or not. That was a disputed question. Page had sworn that he heard no notice. The object of the evidence as to regulations and custom was to show that the customary notice was given on this occasion according to the regulations.

It was not the object of the evidence to show what was done on other occasions, but what was done on this.

The evidence may not have been very material in this case, for Richards subsequently testified positively that he did give the notice, in a certain manner which he described, on the arrival of the train at Syracuse, but the evidence was competent (the order of proof not being material,) to corroborate Richards, and as tending to show notice independent of his evidence.

The material questions in this case are raised by the exceptions to the charge of the court.

The court charged the jury, if the agent at Albany pointed to the train which Page took, then it was necessary for the defendant to show, either that actual notice was given to him, before or on reaching Syracuse, to change cars there, or that such means were used after leaving Albany to give him such notice "that every traveler of ordinary intelligence, by the use of reasonable care and attention, would have acquired a knowledge of that fact;" and that it was not proved affirma-

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tively that notice was in fact given before reaching Syracuse. The court then submitted to the jury the question whether the agents of the defendant did use such means to give the information or notice before or on reaching Syracuse; and charged that, if they did, it was Page's fault, and not that of the Company, that he remained ignorant of the necessity of changing cars at Syracuse and waiting for the next train from Albany, and he was wrongfully in the cars when they left Syracuse; but if they did not use such means, then he was not in fault for continuing on the same train from Syracuse.

The exception was to that portion of the charge which submitted to the jury the question whether the agents of the defendant had used such means (as had been previously defined by the court) to give the information or notice, and the consequent portion charging that if the jury believed such means were used, then it was Page's fault and not that of the Company that he remained ignorant of the necessity of the change, and he was wrongfully in the cars, &c.

In my opinion, this was submitting the question of notice to the jury quite as favorably to Page as it should have been.

The exception raises this question, and none other, that I can see: If, before or on reaching Syracuse, notice was given that the passengers for Lyons must change cars there, in such manner that all the passengers of ordinary intelligence, and with ordinary care and attention, would have heard it, was Page wrongfully in the cars when they left Syracuse?

The plaintiff's counsel insists that the action of the defendant's ticket agent at Albany, in pointing to the cars which Page took, was a misdirection, and misled Page, and put the defendant in the wrong, and absolved Page from the duty of giving that attention to any information or notice of a change of cars which ordinary passengers are supposed to give, or which he ought to have given, had it not been for the misdirection; that, if he was not awake, if he did not exhibit any vigilance at all, it was the fault of the Company, which had misled him in designating the train which he took at Albany as the train that went to Lyons. But can the direction of the

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ticket agent at Albany be called a misdirection? I think it cannot. Passengers from Albany for Lyons could go by either the 6 $\frac{1}{2}$ or 7 $\frac{1}{2}$ o'clock train. If Page took the 7 $\frac{1}{2}$ o'clock train, he had to wait in Albany an hour; if he took the 6 $\frac{1}{2}$ o'clock train, he had to wait at Syracuse an hour and thirty-five minutes. How was the ticket agent at Albany to know that he did not prefer the delay at Syracuse? From his presenting himself and purchasing the ticket just before the 6 $\frac{1}{2}$ o'clock train started, the agent had a right to presume that he preferred that train. Under these circumstances, I think the designation by the agent of the 6 $\frac{1}{2}$ o'clock train as the train for Lyons cannot be called a misdirection or fault. It was natural and reasonable under the circumstances that he should tell Page that the 6 $\frac{1}{2}$ o'clock train was the train for Lyons, for the ticket which he bought would take him there, if he took the 6 $\frac{1}{2}$ o'clock train, in about the same time as the 7 $\frac{1}{2}$ o'clock train, and the agent had a right to suppose that he preferred the 6 $\frac{1}{2}$ o'clock train.

The next exception to the charge of the court was to that part of the charge submitting to the jury the question of fact whether Page was told by the conductor before reaching Marcellus to change cars there. As to this, the evidence was contradictory. The charge was, substantially, that, if the jury found that Page was not in fault in continuing on from Syracuse under the rules which had been laid down as to the notice to change cars on or before reaching there, then, if he was not told, before reaching Marcellus, that he was on the wrong road, nothing occurred before reaching Marcellus to place him in the wrong; but if he was told before reaching Marcellus that he was on the wrong road, that he would meet there a train going to Syracuse which he must stop and take, then it was his duty to have done so, if the jury believed that he would have reached Syracuse in time to take the train which left Albany at 7 $\frac{1}{2}$ A. M. for Lyons, and that he would have been carried back to Syracuse free of charge.

A train was met at Marcellus which Page might have taken and returned to Syracuse. There was no contradictory evi-

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dence on this point. The conductor had testified that he told Page, before reaching Marcellus, to take the train which would be met there going to Syracuse. Page had testified that he had not been told that he was on the wrong road before reaching Marcellus. The conductor had not testified that he told Page that he would be carried back free, but he had testified that it was the custom of the Company to do so under such circumstances; that he never knew of a charge for taking a person back who got on the wrong road by mistake. Page did not pretend that he made any inquiry as to his being carried back free. This being the evidence bearing on the question whether Page should have changed cars at Marcellus, I see no error in the charge of the court in submitting that evidence to the jury. If it was the fault of the employees of the defendant, and not of Page, that he did not change cars at Syracuse, how could they remedy their fault otherwise than by sending him back to Syracuse in time for the 7½ A. M. train from Albany, free of additional charge? I see no other way. He was not tendered a free pass back, nor told that he would be carried back free; but, if told by the conductor, before reaching Marcellus, to take the train which was met there back to Syracuse, ought he not to have assumed that, under the circumstances, he would have been carried back without charge? It appears to me that the questions whether, if he had taken the train at Marcellus for Syracuse, he would have reached there in time for the 7½ o'clock train from Albany, and whether he would have been carried back without charge, were properly submitted to the jury. It cannot be said, I think, if Page was carried on the wrong road from Syracuse to Marcellus without any fault of his, that, therefore, he had a right to be carried to Rochester on the wrong road.

My conclusion is, that the judgment of the Superior Court should be affirmed, with costs.

Judgment affirmed.

 Byxhie v. Wood.

BYXBIE *et al.* v. WOOD.

94	607
118	335
94	607
121	598

That a complaint, under the Code, states fraudulent representations of the defendant, by which the plaintiff was induced to pay him money, which he seeks to recover back, does not necessarily stamp the action as one in tort, or show that the cause of action is not assignable.

It is no objection to a recovery in such a case that fraud is not proved, if sufficient facts appear to warrant a recovery as for money had and received.

Nor is it an objection to the assignability of the cause of action that the party paid the money under a sealed agreement, and signed admissions that the several accounts upon which he made payments were correct.

APPEAL from the Superior Court of New York city. The plaintiffs, as assignees of Edward E. Marvinne, sued the defendant to recover from him certain sums of money, which it was claimed that he had obtained from Marvinne by means of various false statements and representations; which representations and statements were also characterized in the complaint as fraudulent. One of them was as to the price of a barque, which the defendant represented to have cost him twelve thousand dollars, but which, in fact, had cost but four thousand dollars. For a half-interest in the barque, Marvinne, by a sealed contract, agreed to pay six thousand dollars. The defendant and Marvinne embarked in a joint adventure, which consisted in the purchase and fitting out of the barque and supplying her with a cargo of a very miscellaneous character for a voyage to California. It was stated in the complaint that the defendant, by whom the purchases were made, falsified the accounts of such purchases, so as to represent himself to have paid out a much larger amount than he actually had; and that, upon the basis of such false accounts, Marvinne paid to the defendant, upon a settlement, as his share of the expenses of the adventure, six thousand five hundred and fifty-nine dollars and sixty-two cents more than was really due from him; which sum, with interest, the plaintiffs claimed to recover. The

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complaint also stated that the defendant exhibited to Marvine, as an inducement to enter into the adventure, a letter purporting to have been written by one T. O. Larkin to the defendant, apprising him of the discovery of gold in California, and recommending the shipment of an assorted cargo to that territory, as likely to be attended with enormous profit.

To this action the defendant, by answer, interposed various defences: 1. That Marvine had not assigned the claim, but was still the true party in interest; 2. That all the statements made, and accounts rendered with such statements, were true, and the defendant had received only the money he was entitled to, and that the accounts were fairly settled; 3. That Marvine had not paid the amounts claimed, as some of the property in which, (at an estimated value,) part payment was made, was subject to certain liens. It was further claimed on the trial, that, by a motion for a nonsuit, the defendant raised the point that the claim was not assignable, and also the point that Marvine ought to have been made a party plaintiff to the suit, and, therefore, the plaintiffs could not recover, because there was a defect of parties.

The cause, when at issue, was duly referred to three referees, who proceeded to hear the same, and in the course of the trial admitted some evidence to which the defendant objected, and, on its admission, excepted thereto; and at the close of the trial the referees made a detailed report of their findings of fact and conclusions of law, ending with an award of judgment in favor of the plaintiffs. From the judgment, entered on that report, the defendant appealed to the Superior Court at general term. That court affirmed the judgment, and from such judgment of affirmance the defendant appealed to this court.

John W. Edmonds, for the appellant.

Wm. Curtis Noyes, for the respondents.

GOULD, J. Some of the grounds urged to reverse this judgment are of little moment. Such is the point that the referees

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erred; in refusing to allow the defendant's set-off, or counter-claim, as to certain moneys paid by him. To which point it was sufficiently answered below, that the pleadings set up neither counterclaim nor set-off, and, therefore, none could be allowed.

The claim of error in admitting evidence as to the letter of T. O. Larkin is manifestly unfounded; since, if fraud were the foundation of the action, it was clearly admissible; and if fraud were not the foundation of the action, the evidence was so utterly valueless that it could not have influenced the minds of the referees, and no finding, of even inducement to the agreement between the parties, is based on it, and no inference is drawn from it.

To the claim that there was a defect of parties, in that Marvin was not made a party plaintiff, there is a complete answer in law, in that such a point must be expressly raised either by demurer or answer, and it is not raised in either way. (Code, §§ 144-148.)

That Marvin was the real party in interest is expressly negatived, as matter of fact, by the ninth finding of the referees, that he "*duly assigned and transferred* to the plaintiffs all claims and demands, which he had against the defendant, arising out of such adventure," &c., in terms covering all the referees sustained as a cause of action. The question, (in any case,) whether the plaintiff is the true party in interest, or whether the title under which he sues is a mere sham, is, of course, one that every defendant is entitled to try. And if he relies upon facts, instead of, or beyond, or in contradiction to, the plaintiff's paper title or assignment, the question is not one of law for the court, but one of fact on which the jury are to pass. In this case the referees have so passed, and the finding is final. We are thus brought to the consideration of the chief ground taken on the part of the defendant, which is, that the cause of action, as laid in the complaint, was founded on fraud and deceit, and that such an action was for a tort of such a nature that the cause of action is not assignable. The authorities cited by the defence in support of this position,

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(*Addington v. Allen*, 7 Wend., 9; *Zabriskie v. Smith*, 8 Kern., 838,) go far to answer the position; since they show just what that action is, and that it is not for false and fraudulent representations by which the defendant himself obtained money or property, but for such representations, as to the credit and responsibility of a third person, as induced the plaintiffs in those suits to sell property on credit to such third person, and thereby the plaintiffs were injured, though neither the defendant nor his property was benefited. So far as the defendant's act and the defendant himself were concerned, it was a mere naked tort; and even as to these decisions, it may be advisable to see how fully they accord with the Revised Statutes. (2 R. S., 447, §§ 1, 2.)

Such is by no means the case before us. The facts, as found by the referees are, that, by false representations and the alteration of bills and vouchers, the defendant himself received from Marvine large sums of money to which he was not entitled; and they have found that the plaintiffs are entitled to recover, not for any fraud, but for the money which the defendant had so received, and which, being so received, he had no right to retain. This state of facts does not necessarily require an action to be brought for the tort, even if it allows one to be so brought. Such facts always raised, in law, the implied promise which was the contract-cause of action in *indebitatus assumpsit* for money had and received. Having money that rightfully belongs to another, creates a debt; and wherever a debt exists without an express promise to pay, the law implies a promise; and the action always sounds in contract.

Under the Code this implied promise is treated as a fiction, and the facts, (out of which the prior law raised the promise,) are to be stated without any designation of a form of action; and the law gives such judgment as, being asked for, is appropriate to the facts. Of course, we cannot now say that a particular phrase makes a particular form of action, so that a party, by its use, may shut himself out from the remedy which his facts would give him. He may, indeed, so utterly

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misconceive his rights as to make a complaint not at all adapted thereto; so that his offered proofs, (or even his proofs put in without objection,) would require an entirely new complaint to reach them, and then no court can give him judgment.

In the case before us, the assignment to the plaintiffs purports to be of "claims and demands, either for *moneys received or owing*, or for *false and fraudulent representations*, or *deceit*, which I have, &c., by reason of" the transactions between Marvine and Wood. The complaint says that Wood made false and fraudulent representations to Marvine about the moneys paid for joint account, and "by means of such false representations fraudulently and deceitfully obtained" property, &c., from Marvine; and the plaintiffs, (as assignees of Marvine,) "*therefore demand judgment against the defendant for the sum of \$8,559.62, and interest from October, 1848.*" It would hardly seem that this is a complaint for a mere naked tort in an action claiming damages for the wrong. And unless it be so, necessarily and unavoidably, the ends of substantial justice would require us to disregard the words that charge a wrong.

Yet even this seems not now a necessary ground for sustaining this judgment. What valid objection is there to treating these words, ("fraudulently and by deceit,") as mere inducement, containing a statement of the facts which show that Marvine's payment was not a voluntary one with knowledge of the facts, and that, therefore, he was entitled to sue to recover back the money; and thus anticipating a defence? How, without some such statement, was he to show that it was not a voluntary payment, or that his settlement of the accounts was not final and binding on him? If, to avoid either of those objections, in an action to get back the money paid, he could have proved the actual facts, there can be no objection to his stating them in his complaint.

But conceding that a tort be one of the elements that go to make up this cause of action, it will be found to be assignable. It will be seen to be of that class of torts the right of action

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for which would survive to the personal representatives of the claimant; and "the power to assign and to transmit to personal representatives are convertible propositions." (*Zabriskie v. Smith, supra.*) And, further, it is, within the decisions both before and since the Code, of a nature that was formerly assignable in equity, and is now assignable at law. In *McKee v. Judd*, (2 Kern., 625,) it is held "that demands arising from injuries *strictly personal*, (whether arising from tort or contract,) are not assignable, but that *all others are.*" (8 Kern., 333-335, 336; 15 N. Y., 432.) And by the Revised Statutes (2 R. S., 447, § 1), "for *wrongs* done to the *property, rights* or *interest* of another, for which an action might be maintained, &c., such action may be brought after the death of the person injured, by his executors or administrators, in the same manner, &c., as actions founded upon contracts. And the exceptions to this broad general rule are contained in the next section, and are confined to injuries to the person or character. In this case, if the action be for the fraud and deceit, it is for a "wrong done to the *property,*" &c., of *Marvine*; and by the statute could be brought after his death by his personal representatives, and is assignable.

The defendant's counsel claims that the findings of fact by the referees do not sustain the judgment, because they have not found the fraud, which is alleged in the complaint. It is quite true that they have not found the fact of fraud; but as we hold that the action is sustainable without there having been any fraud, and merely as an action for money, which the defendant has no right to retain, the failure to find fraud is no objection to the validity of the judgment, and it is to be affirmed as not being an action for the fraud.

It is proper to note another point taken for the defence: that, as the assignor of the plaintiffs, (*Marvine*), had settled the account and receipted it as correct, the right to set aside that settlement, and avoid the effect of it as a substantial release to the defendant, and the right to avoid the effect of fixing the price, by the sealed contract to give \$8,000 for one-half of the barque, were personal rights, which *Marvine* him-

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self must assert, and which he could not assign. This is conclusively answered, by holding, as we do, that an account settled, or a release executed, is not the title by which the defendant received, or held the money, but a mere acknowledgment that, the items being true, the balance is correct, or that upon those stated facts the defendant is liable to repay the money: that the contract of purchase of the barque is not avoided, but the undue price is examined, and the excess is to be recovered as money had and received to the use of the plaintiff; and, in suing for the money, it is entirely immaterial, (in our present modes of pleading,) whether the plaintiff anticipates what would be matter of defence, and says in advance that it was so obtained as to be invalid, and no defence, or whether he omits all mention of it, and on the trial, when it is interposed as a defence, proves the fraudulent obtaining of it which makes it void, and no defence. The right of action is not founded on it; and it bears no resemblance to an instrument through which is to be made the title which is to found an action, and which requires to be reformed, or set aside, to obtain that title.

In any view, therefore, the judgment of the Superior Court should be affirmed.

The court did not pass upon the question whether, assuming the action to be for tort, it was of such a character as to be assignable.

Judgment affirmed.

CLEVELAND v. BOERUM *et al.*

An assignee in bankruptcy under the act of 1841, who has notice of a suit for the foreclosure of a mortgage pending against the bankrupt, which he could defend in the name of the bankrupt, is bound by the decree, though not made a party nor intervening in the suit.

It seems that the assignee, or his grantees, if not foreclosed, were limited, by the eighth section of the act of 1841, to the period of two years for the commencement of an action to redeem the land mortgaged: *Per SUTHERLAND, J.; DENIO, GOULD and ALLEN, Js., concurring.*

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APPEAL from the Supreme Court. Action for the redemption of land from a mortgage executed in March, 1836, by J. S. McKibben and Thomas Nichols. The sum secured was \$39,000, payable in April, 1841. In February, 1842, the mortgagees filed a bill in Chancery for the foreclosure of the mortgage, to which McKibben and one Strong, who had succeeded to all the interest of Nichols, were made parties defendant. Notice of the pendency of the suit was duly filed in the office of the clerk of Kings county, where the land was situated, March 7, 1842. Strong and McKibben appeared in the action; and on the 27th April, 1842, the usual order was made, requiring them to answer in forty days. The bill was taken as confessed for want of answer, and a decree of foreclosure made in November, 1842, under which the land was sold and conveyed by the Master to the defendants in this action on the 24th January, 1843.

Pending the foreclosure, Strong and McKibben filed their respective petitions praying that they might be declared bankrupt—McKibben on the 16th May, 1842, and Strong on the 16th June, 1842. In the schedule of debts annexed to each of their petitions the mortgage above mentioned was fully set forth, and in that annexed to McKibben's petition it was stated that a suit for the foreclosure thereof had been commenced. Both were duly declared bankrupt, and W. C. H. Waddell was appointed assignee of McKibben in June, 1842, and of Strong in July, 1842. Waddell did not apply to be made a party to the foreclosure suit, nor was any step taken by the plaintiffs in that suit to make him a party.

On the 4th March, 1844, the assignee, Waddell, sold the interest of Strong in the mortgage to one Clute, but did not execute a conveyance thereof until March 5, 1846. Clute conveyed to the plaintiff in this action, who, in November, 1844, had purchased of the assignee Strong's interest, which was conveyed to him in November, 1845. After offering to pay up the mortgage, and a refusal by the defendant, the plaintiff commenced this action on the 24th January, 1853. Upon proof of the foregoing facts, the judge before whom the

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cause was tried dismissed the complaint. The judgment for the defendants was affirmed at general term in the second district, and the plaintiff appealed to this court.

John A. Oblier, for the appellant.

Amasa J. Parker, for the respondent.

SUTHERLAND, J. In my opinion, the two years' limitation by section 8 of the bankrupt act (Acts of Congress, 1841, 5 Stat. at Large, p. 446) is a bar to this action. It is provided by section 8 that "no suit at law or in equity shall, in any case, be maintained by or against such assignee, or by or against any person claiming an adverse interest touching the property and rights of property aforesaid [the property of the bankrupt vested in the assignee by the decree], in any court whatsoever, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall have accrued." I think the interest or claim of the mortgagees touching the mortgaged property, under the mortgage, was adverse to the legal title and interest in the property vested in Waddell, the assignee, by the declarations and decrees of bankruptcy, within the meaning of this provision. The mortgage was due, and was a charge or lien on the legal title or interest vested in the assignee by the decrees of bankruptcy; and, although possession under the mortgage before foreclosure and sale would not have been adverse to the mortgagors or those claiming under them, yet, I think, the interest of the mortgagees was an adverse interest touching the mortgaged property at the time of the making of the decrees of bankruptcy, within the meaning of the provision of the 8th section of the act above quoted. I think the interest of the mortgagees may be said to have been an adverse interest touching the property to the extent of the amount due on the mortgage, for there was no right of redemption without paying, or offering to pay, the amount due on the mortgage.

The interest of the mortgagees was not only an adverse interest touching the property within the meaning of this pro-

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vision, but, at the time of the vesting of the property in Waddell, the assignee, by the decrees of bankruptcy, this interest was in a most adverse or inimical position. A suit to foreclose the equity of redemption, to which McKibben and Strong, the bankrupts, were parties, was then actually pending, and of this suit, Waddell, the assignee, had notice, for in the schedule annexed to the petition of McKibben it was not only stated that the property was subject to the mortgage, but also that a suit had been commenced to foreclose it. The moment the legal title or interest passed to the assignee by the decrees, he had a right, by and under the order and direction of the court in bankruptcy (§ 11 of the act), to redeem. If there was any defence to the foreclosure suit, he had a right to defend by section 8 of the act. It is plain from sections 8 and 10 that it was the intention of the act that all questions concerning the bankrupt's property should be speedily settled, so that the bankrupt's property could be sold and the proceeds distributed among his creditors. If the interest of the mortgagees was an adverse interest touching the property within the meaning of section 8, at the time of making the decrees, then, by the very words of the section, no suit could be maintained against the person or persons claiming that interest, unless brought within two years after the declarations and decrees of bankruptcy. I do not see why the assignee, by section 8, was not bound to apply to the court for direction to redeem, and, if he could not redeem without suit, for direction to bring a suit for that purpose, and to bring such suit within two years after the decrees.

If the limitation of two years commenced running upon the vesting of the legal estate in the assignee by the decrees, then the right to redeem by suit never passed to the plaintiff, for the suit was barred by the limitation before the legal estate passed from the assignee. The decrees were made on the 16th of June and 28th July, 1842. McKibben's interest was sold by the assignee to the plaintiff on the 25th November, 1844, and the deed therefor executed to him on the 24th November, 1845. Strong's interest was sold by the assignee to Clute on

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the 4th and 10th days of March, 1844, (within two years after decree,) but the conveyances to Clute for the same were not made until the 5th and 18th March, 1846; and Clute conveyed to the plaintiff the 7th and 19th of March, 1846. But suppose the two years' limitation commenced running at the date of the deeds under the Master's sale, (January 23d, 1843,) on the ground that the cause of suit, within the meaning of section 8 of the act, then first accrued; even then the action was barred before the legal title or estate passed from Waddell, the assignee, by his conveyances. Waddell could not convey or assign a right of action which had been cut off by the act, and which, therefore, he had not himself. I am inclined to think, also, that the plaintiff's right of action was barred by the ten years' limitation by statute. (2 R. S., pp. 301, 302, § 52; Code, § 97.) I think the ten years commenced running at least at the date of the foreclosure sale, which was on the 12th of January, 1843. This action was commenced on the 24th of January, 1853. But I prefer to put my opinion in favor of an affirmance of the judgment of the Supreme Court upon the ground alone that the plaintiff's action was barred by the two years' limitation provided in the act of Congress. My conclusion is, that the judgment of the Supreme Court should be affirmed, with costs.

DENIO, GOULD and ALLEN, Js., concurred that the two years' limitation was a bar to the action.

WRIGHT, J. A prominent and perhaps principal question is whether the decree in the foreclosure suit, barred the equity of redemption; for, if that was its effect, it is conceded that the plaintiff can maintain no action to redeem the mortgaged premises. It is well settled that a judgment in an action *in rem* binds not only the parties, but all claiming or deriving title under them by a transfer *pendente lite*. A purchaser or assignee, during the pendency of the suit, is bound by the decree made against the person from whom he derives title. (11 Ves., 194.) Indeed, text-writers extract from the cases the

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broad rule that decisions *in rem* are binding and conclusive, not only upon the parties actually litigating the cause and their privies, but upon all others, if the suit was commenced against the proper parties, and if the judgment was obtained *bona fide* and without fraud. (Greenl. Ev., §§ 525, 540, 541, &c. ; 1 Stark. Ev., 446, 547.) The present case is claimed to be an exception to the general rule, inasmuch as the right of McKibben and Strong had, during the progress of the cause, become vested in their assignee in bankruptcy, who had not been made a party. The idea is, that an assignee, upon whom the interest of the bankrupt has been cast, by operation of law, for the benefit of others, has a right to be heard for the protection of that interest; and what is constructive notice to the rest of the world is none to him, but to have made the decree binding on him, though in this case, having actual notice of the pendency of the foreclosure suit, he should have been brought in as a party by the plaintiff. I cannot coincide in this view. Undoubtedly the assignee had the right to defend, and he might have done so in the names of McKibben and Strong; but it was optional with him whether to defend or not, and if he elected not to interfere, the judgment should not be ineffectual or invalid because the plaintiff did not stop short in the suit and do something affirmatively that they had the right to claim should not be done, viz., substitute the assignee, against whom no personal claim could be made, for the mortgagors, against whom they had a right to a personal judgment for any deficiency. The holder of a mortgage is not precluded by a proceeding in bankruptcy from coercing by action a sale of the mortgaged premises for the satisfaction of his debt, and I can perceive no stronger reason for excluding an assignee under the bankrupt act of 1841, (who becomes such by the voluntary act of the bankrupts and not *in invitum*,) from the operation of the rule, than though the assignment were made voluntarily to any other person for the benefit of creditors. McKibben and Strong, the owners of the equity of redemption, were made parties and appeared in the foreclosure suit before there had been a transfer in any way of their interest. Had

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they afterwards voluntarily by deed transferred their interest to a stranger, even for the payment of debts, it will not be pretended that it would have been necessary to bring such assignee in as a defendant to bind him by the decree. Why necessary, when the assignee is the general one under the bankrupt act? The initiation of the proceeding was in no sense coercive or compulsory, but on the petition of the bankrupts, and they voluntarily procured the transfer. I am aware that there are English and American cases holding that, when the interest of a party is, by operation of law, and not by the act of such party, cast upon the assignee, the proceeding will be defective unless the assignee be brought in; and there are *dicta* in our own courts giving an assignment in bankruptcy as an example. The case of *Sedgwick v. Cleveland* (7 Paige, 287), which was decided before the bankrupt act of 1841, is of that class. The cases proceed upon the doctrine that, as a general rule, the real persons in interest must be parties to a suit in Chancery; and when, *ex invitum*, a party has assigned his interest, the assignee must be made a party, before the suit can be further proceeded in. Neither the case of *Sedgwick v. Cleveland*, nor any other in this State to which I have been referred, holds that, when there has been a transfer under the bankrupt act of 1841 to an assignee, who is empowered to protect the interest vested in him, either by procuring himself to be substituted as defendant in place of the bankrupt, or by permitting the suit to proceed in the bankrupt's name, and such assignee does not defend, but suffers a judgment *ex rem* to be taken, such judgment is not binding and effectual, as against the assignee. Under the English bankrupt laws and our creditor's bills, when the transfer of property is the result of a compulsory proceeding, there is reason for saying that the transfer is by operation of law and involuntary; but I can observe none when the interest of the defendants has been cast upon the assignee by the voluntary act of the parties, and not so much for the benefit of creditors as for their own benefit. It can certainly make no difference in principle, when the transfer is caused by act of

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the party, whether it be made by deed or proceeding in court; and if made in the latter way, there can be no reason for making a distinction as to the duty of the assignee. Waddell's rights accrued after filing of the notice of *lis pendens* in the foreclosure suit, to which his assignors were parties; and the interests of the bankrupts having been cast upon him by their voluntary act, I think he stands in the transaction upon the same footing as if he had taken a voluntary assignment for the benefit of creditors. The constructive notice by virtue of the *lis pendens* would have been effectual as against the assignees by deed *pendente lite* of McKibben and Strong, and there can be no reason in principle, or any rule of practice, why it should not be so when the assignment is voluntarily effected by instituting a proceeding to secure to them the benefit of the bankrupt act of 1841. To enable the assignee to protect the interests of the creditors of McKibben & Strong, it was not necessary that the plaintiffs should take any affirmative step, for the bankrupt act cast the duty on the assignee and clearly contemplates affirmative action on his part. If the bankrupts have any defence he may make it in their names, or he may be substituted in their stead. In this case the assignee could not have been substituted by displacing the defendants, for it was the right of the plaintiffs to have the mortgagors retained as defendants to enforce a personal claim against them. He might, perhaps, have been added, but not substituted. So that, after all, whether the decree in the foreclosure suit shall be binding and effectual upon, or a nullity as respects the assignee, depends upon a question of practice, viz., whether the plaintiffs or the assignee should have taken the initiative in causing the latter to be added as a defendant. It was not important to the plaintiffs, in the enforcement of their lien, that he should have been added as a party; and the assignee could have as fully discharged all the duty he owed to creditors by defending in the names of the mortgagors. Though the entire interest of the bankrupts vested in the assignee, and they were, so far as respected such interest, to be regarded as *civilitur mortui*, yet, irrespective of the question of title or ownership, the bank-

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rupt law provided that all pending suits at law or equity, in which the bankrupts were parties, might be prosecuted or defended by the assignee to their final conclusion, in the same way and with the same effect as they might have been by the bankrupts. The foreclosure suit did not abate or become so defective that it could not be further proceeded in until the assignee was made a party by supplemental bill. I can well perceive, in a pending suit in equity, where the whole interest of a party in the subject-matter in litigation is, by operation of law, transferred to a receiver or assignee, and there is no provision for the receiver or assignee prosecuting or defending the action in the names of the original parties, that such assignee or receiver should be brought in before further proceedings; but no such necessity can exist when the assignee is empowered by law to prosecute or defend in the name of his assignor. So that if Waddell is to be regarded as not standing upon the same footing as though he had taken a voluntary assignment, but is to be treated as if the interest of McKibben and Strong had been cast on him, by operation of law, for the benefit of creditors, a way was provided for him to be heard, and the duty was cast upon him to pursue it, if thereby the creditors were to be benefited. He had notice of the pendency of the foreclosure suit, and it was his duty to act for the protection of the interest vested in him, and to that end it was unnecessary that he should be added as a party. The presumption is that he did his duty. It affirmatively appears that McKibben and Strong had no defence to the foreclosure; and of course the assignee had none. It was his duty to interpose no defence, if he saw there was none. He was not required to raise so large a sum of money to pay off a lien, when the property was worth little more than the incumbrance. As the assignee did not ask to be made a defendant, I think it will be intended that he preferred defending, and did defend, as far as he could, in the names of the original defendants.

I can perceive no valid reason why Waddell was not bound by the proceedings and judgment in the foreclosure suit. If he had a right to be heard for the protection of the interest of

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creditors, opportunity was given. If it were really necessary that he should have been made a party, it ought to have been on his application. An assignee in bankruptcy must necessarily, in all cases, have actual notice of all the facts. Waddell had such notice. The mortgagees, who complied with every requisite in commencing the suit, had no actual knowledge or means of knowledge of a change of interest. Under these circumstances it devolved on the assignee, if it were necessary to make him a defendant, to have it done on his application; or otherwise it will be intended that he preferred to defend and did defend in the names of his assignors, the original defendants. It cannot be that because an assignee in bankruptcy neglects his duty, with a knowledge of the facts, that a judgment *in rem* in a pending suit regularly obtained, when all the proper parties are brought into court at its commencement, is to be treated as a nullity, and of no binding force. So far as the assignee is concerned, if this were so, the assignee might lie by in any pending action for the foreclosure of a mortgage, and if the mortgagees, without knowing, or the means of knowing, that the mortgagor *pendente lite* had declared a bankrupt, proceeded to judgment, and the title acquired at the foreclosure sale passed through divers *bona fide* subsequent purchasers as in the present case, at any period within ten years at least after such purchasers went into possession, the assignee (and, as it is claimed, his transferees) might file their bill to redeem the mortgaged premises. In short, that the assignee might neglect the duty devolved on him by law to defend, and if the mortgagee failed to discover the transfer to him of the mortgagor's interest *pendente lite*, and consequently took no step to have him brought in as a party, at any time for ten years afterwards, he might do what he was required to do in the first instance for the protection of the interest of creditors, viz., pay off the lien. I am certain that this has not been the understanding of the profession or the public. The assignee in bankruptcy is affected by just such notice as other purchasers or assignees *pendente lite*; and, to make the foreclosure regular and binding upon him, it was not

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necessary that he should have been substituted as a defendant on the application of the plaintiff. He could as well protect the interest of creditors without being added as a party: but if otherwise, he should have asked to come in. Not doing so, the intendment is that he defended as far as he could in the names of his assignors. I think the judgment in the foreclosure suit was conclusive upon him.

The judgment of the Supreme Court should be affirmed.

DAVIES, GOULD, ALLEN and SMITH, Js., concurred that the assignee, having notice of the suit, and being at liberty to defend in the name of the bankrupt, must be deemed to have waived any defence, and was concluded by the decree.

Judgment affirmed.

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A husband, indebted to his wife in the sum of one thousand five hundred dollars and interest, for property which belonged to her at law, and in the further sum of two thousand dollars, with interest, for which equity would have regarded her as a creditor, transferred to the wife property, real and personal, to the value of sixteen thousand dollars. Such transfer, it seems, is not to be regarded as voluntary.

But, if voluntary, the husband retaining property of the value of ten thousand dollars, and being indebted in only the sum of nine hundred dollars, there is no legal presumption of fraud, but the question is one of fact.

The intent to defraud must be inferable from the circumstances; and, if the facts show that the settlement upon the wife was a proper and reasonable one, in the condition of the husband's estate at the time, it will not be invalidated by his subsequent inability to pay a debt then existing.

APPEAL from the Supreme Court. The trial was before a referee, who found these facts: In June, 1858, the plaintiff commenced a suit against the defendant John Eckler to recover his share or proportion of a loss in a venture entered into by them and one Parks in the purchase of corn. This purchasé

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was made by them in the fall of 1854, but the loss was not ascertained until 1856, and it was then about \$900 to each of the three partners. Parks, subsequently and previous to the commencement of that suit, having died insolvent, Babcock, the plaintiff, sought to recover from Eckler the half of the total loss, and on the 30th of April, 1859, he recovered judgment against Eckler for the sum of \$1,603.93, that being the one-half of the then ascertained loss, with interest to that date, besides costs of suit. An execution in that judgment having been issued and returned unsatisfied, this action was commenced to reach certain real estate, in the town of Phelps, Ontario county, claimed to belong to the said John Eckler, and alleged to have been fraudulently conveyed by him to the defendant Polly Eckler, his wife. They were married in 1829, and previous to that time Mrs. Eckler had inherited from her father land of the value of \$2,000, which, by an agreement with her husband, was sold, and the proceeds, together with that of some land owned by him, were invested in the purchase of a farm in the town of Mendon, of which it was agreed they were to be equal owners, and the title to which was taken in the name of the husband. In 1850, Mrs. Eckler inherited from a sister land of the value of \$1,500, which was sold, and the proceeds, with her assent, were invested, controlled and managed by her husband. In November, 1855, John Eckler, then being worth over \$26,000, and having no debt or liability existing against him, excepting that for contribution to the loss (if any) growing out of the corn adventure of the fall of 1854, the existence of which was not shown to have been then known to him, in consideration of this property of his wife, and of love and affection, caused to be conveyed to Mrs. Eckler real estate in Brockport, and personal property, stocks, bonds, &c., all amounting in value to about \$16,000, retaining for himself about \$10,000. All the property thus conveyed to her, except the sum of \$6,000, invested in the farm sought to be reached by the present action to satisfy the plaintiff's judgment, had been sold by her, and applied to the payment of her husband's debts contracted subsequently to January 1st, 1857.

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The referee found, as a question of fact, that neither the conveyance of the property in November, 1855, to Mrs. Eckler, nor of the farm purchased with a portion of the proceeds thereof, were made, procured, or secured with the intent to defraud the plaintiff or the other creditors of the said John Eckler. And he held, as a conclusion of law, that the fact that said John Eckler was liable to the plaintiff in the manner mentioned at the time of the conveyance in November, 1855, and the subsequent purchase with a portion of the proceeds of that property of the Phelps farm, and the conveyance thereof to Mrs. Eckler, was not, under the circumstances, conclusive evidence of fraud against the parties to such conveyance; and he also found, as a conclusion of law, that the plaintiff was not entitled to have satisfaction of his judgment out of said property. On his report, judgment was entered at special term in favor of said Polly Eckler, which on appeal was reversed at general term and a new trial ordered.

William C. Rowley, for the appellants.

William F. Cogswell, for the respondent.

DAVIES, J. In the examination of this case it is only necessary, in our opinion, to ascertain whether the conveyance of the Brockport property and the transfer of the stock and bond to Mrs. Eckler in November, 1855, were or not valid and effectual to vest the same absolutely in her. For if we come to the conclusion that she was then the legal owner of the property thus conveyed and transferred, it follows as a necessary consequence that she is also the legal owner of the Phelps farm, which was subsequently purchased with a portion of the proceeds of this property.

There can be no question that, since the passage of the acts of 1848 and 1849, Mrs. Eckler was the absolute owner of the property inherited from her sister in 1850, the same as if she were a *feme sole*, and that, although her husband had reduced to possession the \$2,000 received on the sale of land inherited

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from her father, a court of equity would protect her rights therein, and make a just and proper settlement thereof on her. If her statement of the agreement between her and her husband is to be regarded as evidence, then in addition to these sums she was entitled to receive, absolutely in her own right, one-half of all the property acquired by them during marriage, and the total amount thus transferred to her in November, 1855, does not greatly exceed the sums confessedly due to her, and such half thus acquired. The conveyance and transfer, therefore, made in 1855, cannot be said to be voluntary. They were made to satisfy, in part, a just and conceded debt due to Mrs. Eckler, and to vest in her her share of the acquired property during marriage. They were made by a solvent man, who did not then know he was indebted to the plaintiff at all, and it is found, as a matter of fact, that at that time he owed no other debt whatever. If he had supposed that he was indebted at all to the plaintiff, and then knew the exact amount of his share of the losses on the corn adventure, that sum was then only about \$900, and he retained to himself property valued over \$10,000. It is very difficult to perceive upon what basis the allegation of an intent to defraud the plaintiff by such conveyance and transfer can be predicated upon these facts.

John Eckler was undeniably indebted to his wife in at least the sum of \$3,500, and conceding he owed the plaintiffs in 1855 \$900, he retained in his possession of his whole property more in proportion to pay that debt than he conveyed and transferred to her in satisfaction of what was due to her. From these circumstances, it is impossible to say that there could have been any intent, in fact, to defraud the plaintiff. Does the law impute such fraudulent intent from the sole fact of such indebtedness of Eckler, conceding that he then knew such indebtedness to exist? It certainly cannot be argued that he can have disposed of his estate with intent to defraud the plaintiff, his creditor, unless he knew or had reason to suppose that he was such creditor. This subject has received the most careful and elaborate discussion in this State, and the

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principles which have been settled should be adhered to. The leading case relied on to avoid a conveyance, transfer, or settlement purely voluntary, is that of *Reade v. Livingston* (8 Johns Ch., 481). In that case the conveyance was to a trustee for the benefit of the grantor's wife, and was voluntary, without any consideration or any prior indebtedness to her. It was urged, to uphold it, that the husband previous to the marriage had made a parol promise to settle \$30,000 on his wife. The Chancellor regarded it as a voluntary settlement, unconnected with any ante-nuptial agreement, and he states the question to be, whether such a voluntary settlement after marriage, by a party indebted at the time it is made, be not, as against such creditors, absolutely fraudulent and void, and he was of the opinion that that question could be most satisfactorily answered in the affirmative.

Jackson v. Seward (5 Cow., 67) was an action of ejectment, and the defendant claimed under a deed from his father to him, made when the father was indebted to the plaintiff's lessor. The deed, on its face, was for the consideration of \$10,000; but the true consideration was certain bonds of the defendant, one to a sister for \$2,277.50; one to another sister for \$2,175, both bearing even date with the deed, and payable six months after the death of his father; and a bond in the penalty of \$10,000 to his father, of the same date, conditioned to pay him an annuity of \$500 in half-yearly payments, on which were indorsed, in the father's handwriting, the payment of these annuities in April of the years 1819, '20, '21, '22, and the only question made was whether the deed to the son was fraudulent in law. The Supreme Court held that it was, and that the conveyance was voluntary, being a deed of gift by the grantor to his children, and so intended by him; and the ruling of Chancellor KENT, in *Reade v. Livingston*, is quoted with approbation, that, "if the party be indebted at the time of a voluntary settlement, it is presumed to be fraudulent in respect to such debts, and no circumstances will permit those debts to be affected by the settlement or repel the legal presumption of fraud." A writ of error was brought

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and the case was heard in the Court of Errors, and is reported in 8 Cowen, 406. The judgment of the Supreme Court was reversed, only one Senator dissenting, and the following points, may be regarded as ruled by the court in that case: 1. That, to make a deed voluntary, it must be without any the least valuable consideration. 2. That the deed in that case was not voluntary. 3. When a conveyance of land is upon any the least valuable consideration, the question whether it be fraudulent as to creditors belongs exclusively to the jury as a question of fact. 4. That a conveyance from a parent to a child, in consideration of love and affection, in other words voluntary, is not absolutely void even as to existing creditors, but the presumption that it is fraudulent may be repelled by circumstances; and this last proposition seems to be fully sustained after an elaborate review of all the English and American authorities on the point by ALLEN, Senator.

In 1832, questions upon this conveyance and the gifts of the bonds to William Seward's children arose in the Court of Chancery, on a bill filed by Van Wyck to set them aside. The Vice-Chancellor held himself precluded, by the decision of the Court of Errors and the verdict of the jury in that case that there was no fraud in fact, from inquiring into the validity of the deed from William to his son; and he says, if it was an open question whether that deed was a voluntary conveyance and to be deemed constructively fraudulent, and whether the evidence in that case made out a case of actual and intentional fraud, he should have great difficulty in answering those questions affirmatively. But I think he distinctly affirms the rule of the Court of Errors, when, speaking of the gifts of the bonds by the father to his children, received from his son on the execution of the deed to him, he says, "If the donor is indebted at the time, such a thing may be *prima facie* evidence of fraud against a creditor, but this presumption may be repelled by proof or circumstances." The decree of the Vice-Chancellor was affirmed by the Chancellor (6 Paige, 62), not on the ground upon which the decision of the former was placed, that the judgment in the ejectment

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suit was a bar, but on the ground that there was no actual fraud in the case. The Chancellor says, "I presume it cannot be seriously urged, that when a parent makes an advancement to his child honestly and fairly, retaining in his own hands, at the same time, property sufficient to pay all his debts, such child will be bound to refund the advancement for the benefit of creditors, if it afterwards happens that the parent, either by misfortune or fraud, does not actually pay all his debts which existed at the time of the advancement." The decision of the Chancellor was affirmed by the Court of Errors (18 Wend., 375)—Senator MAISON, the only Senator giving an opinion voting with the majority of the court, stating that the case of *Jackson v. Seward*, decided in that court, destroyed the distinction which had been supposed to exist between fraud in law and fraud in fact, and that the principles there established ought to control the decision of the present case. But, by the provisions of the Revised Statutes, the question of fraudulent intent, in all cases, is to be deemed a question of fact and not of law, and it is declared that no conveyance or charge shall be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration. (2 R. S., p. 137, § 4.)

In *Robinson v. Stewart* (10 N. Y., 190), the grantor, at the time of the conveyance to his son, was hopelessly insolvent, and the facts disclosed authorized the court to declare the conveyance fraudulent as to creditors. I am unable to see anything in that case which adds strength to the positions taken on the part of the respondents.

The case of *Carpenter v. Roe* (10 N. Y., 227), is, in fact, an authority for a reversal of the judgment in the present case. In that case, the conveyance procured by a husband to be made to his wife was confessedly voluntary and without consideration. The husband was at the time largely indebted, though in unembarrassed circumstances, and believed himself fully able to discharge all his debts and liabilities at maturity. Judge GARDINER, in delivering the opinion of the court, says; "It was sufficient that he was indebted, and that insolvency

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would be the inevitable or probable result of want of success in the business in which he was engaged. He could not, legally or honestly, in this manner provide for himself or family and cast upon his creditors the hazard of his speculation." Judge GARDINER cites with approbation the case of *Hinds' Lessees v. Longworth* (11 Wheat., 199), where the court held a voluntary deed not to be absolutely fraudulent. The court says, "If it can be shown that the grantor was in prosperous circumstances and unincumbered, and that the gift was a reasonable provision according to his state and condition in life, and leaving enough for the payment of the debts of the grantor, the presumptive evidence of fraud would be met and repelled."

Applying these principles to the present case, I arrive at the conclusions, 1. That the conveyance sought to be set aside was not voluntary, but one founded on a good and valuable consideration, to wit, the indebtedness of the husband to the wife; 2. That, even if the conveyance was voluntary, it falls within the rule laid down in the case in 11 Wheaton, and which has been approved of by this court, that at the time it was made in November, 1855, the grantor was in prosperous and unembarrassed circumstances, the gift, under all the circumstances of indebtedness to the wife and the agreement to divide with her equally the earnings of their married life was a reasonable and proper provision for her and her children, the husband retaining for himself nearly an equal amount; and it being conceded, that enough and far more than enough was retained by him to pay off and discharge the debts which it was subsequently ascertained that he owed, or which at the time he might reasonably have supposed he owed. If fraud could therefore be presumed, the facts and circumstances sufficiently rebut it, and I can see no ground upon which the arrangement and conveyance made in November, 1855, can be impeached. Subsequent indebtedness cannot be invoked to make that fraudulent which was honest and free from impeachment at the time, especially in a case like the present, when the grantee has voluntarily appropriated the larger

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portion of the property conveyed to her, in payment and discharge of such subsequent debts, retaining only about the amount of the debt which is undeniably due to her. This court held, in *Robinson v. Stewart*, that it was lawful for the father to provide for the payment of the debt justly due from him to his son, and that, to the extent of that debt, he might lawfully be preferred. There could therefore be no objection, even if Mr. Eckler had been embarrassed and even insolvent in 1855, in his securing to his wife payment of the sums due to her, or in his transferring property adequate to secure its payment. He had a right to prefer her to his other creditors, if he saw fit so to do. But we think in this case the conveyance could be sustained, even although it had been voluntary and without any consideration, upon the authority of *Hinds' Lessees v. Longworth* (*supra*), and of *Carpenter v. Roe*, in this court.

The order of the Supreme Court granting a new trial should be reversed, and the judgment of the special term should be affirmed, with costs.

SUTHERLAND, J. From the opinion given at the general term it would appear that a new trial was granted on the ground that, from the facts found by the referee relating to the transfer of the property in 1855, the law presumed that transfer to have been fraudulent as to the plaintiff as a creditor of Eckler, and that, therefore, the referee's conclusion of fact, that such transfer was not fraudulent, was erroneous. This, I think, was a mistake. There cannot properly be said to be any such presumption of law from the facts found by the referee, even assuming that such transfer was entirely voluntary; that Mrs. Eckler was not a creditor of her husband to any amount, and that the plaintiff was a creditor of his to the amount of his judgment at the time of such transfer. Fraud implies a fraudulent intent, and is an inference or conclusion of fact drawn from the facts or circumstances of the particular transaction. If it is a presumption, it is a presumption of fact, and not of law. (1 Greenl. Ev., §§ 44, 48.) When a party is charged with fraud, the presumption of law is, that he is innocent until it

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has been shown that he is guilty. (1 Greenl. Ev., § 80.) The circumstances to show fraud, and the circumstances to rebut it, are arguments on the question of fraud, and a conclusion on the question of fraud is a conclusion of fact arrived at by weighing those arguments.

If the necessary consequence of a conceded transaction was defrauding another, then, as a party must be presumed to have foreseen and intended the necessary consequences of his own act, the transaction itself is conclusive evidence of a fraudulent intent; for a party cannot be permitted to say that he did not intend the necessary consequence of his own voluntary act. Intent or intention is an emotion or operation of the mind, and can usually be shown only by acts or declarations, and as acts speak louder than words, if a party does an act which must defraud another, his declaring that he did not by the act intend to defraud, is weighed down by the evidence of his own act. But in such a case it is not proper to say that there is a presumption or conclusion of law that the transaction is fraudulent; but it is proper to say that the circumstances of the transaction, or the transaction itself, is conclusive evidence of fraud; and if in such a case, against such evidence, a jury or referee should find that there was no fraud, a new trial would be granted, not because any legal presumption or conclusion had been violated, but because the finding was against the weight of evidence; against conclusive evidence.

In *Reade v. Livingston* (8 John. Ch., 500, 501), Chancellor KENT held that a voluntary conveyance was presumed to be fraudulent as against all existing debts, without regard to their amount, or the extent of the property conveyed or retained by the grantor: that the presumption of fraud in such case was a presumption of law, and could not be repelled by proof of circumstances going to show that in fact there was no intention to defraud. This decision assumed, as a principle of law, that a voluntary conveyance was void as to any and all then existing creditors, without regard to the question of intention, because it might ultimately operate to defeat the collection or payment of their debts. A similar doctrine was held by the Chan-

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celler in *Bayard v. Hoffman* (4 John. Ch., 450). It is not important now to inquire how far this doctrine was supported by the cases cited by the Chancellor. Certainly, Lord MANSFIELD held a different doctrine in *Cadogan v. Kennet* (Cowp., 484). A different doctrine was held in *Jackson v. Town* (4 Cow., 599), and by Judge SPENCER in *Verplanck v. Sterry* (12 John., 556, 557), though perhaps not decided in the case. In this case Judge SPENCER said: "If the grantor be not indebted to such a degree as that the settlement will deprive the creditors of an ample fund for the payment of their debts, the consideration of natural love and affection will support the deed, although a voluntary one, against his creditors; for, in the language of the decisions, it is free from the imputation of fraud." In *Jackson v. Seward* (8 Cow., 406), it was held by the Court of Errors that a conveyance or settlement, in consideration of blood and natural affection, though by one indebted at the time, was *prima facie* only, and not conclusively fraudulent. Subsequently, by section 4, of title 3, chapter 7, part 2 of the Revised Statutes (2 R. S., 137), it was declared that the question of fraudulent intent, in all cases arising under the provisions of that chapter, should be deemed a question of fact; and that no conveyance or charge should be adjudged fraudulent as against purchasers or creditors, solely on the ground that it was not founded on a valuable consideration. The question in this case arises under the provisions of this chapter of the Revised Statutes, which treats "of fraudulent conveyances and contracts, relative to goods and chattels and things in action." No decision or series of decisions, then, can make the question of fraud in this case a question of law, or establish that there is a legal presumption of fraud from the facts and circumstances found by the referee; for the statute declares that the question of fraud shall be deemed a question of fact, and by declaring it to be a question of fact, in effect declares that there is no such legal presumption. No decision or series of decisions can repeal a statute. The statute substantially declares, and was intended to declare, the doctrine held in *Jackson v. Seward*. (8 Cow.)

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The question of fraud, then, in this case, was a question of fact, for the referee to decide under all the circumstances of the case; and looking at the facts and circumstances specially found by him and on which he decided it, particularly the fact that Eckler did not transfer to his wife all his property in 1855; that he retained in available securities more than six times the amount of the debt of the plaintiff, even as it was established more than three years afterwards; that he was not indebted to any one at the time of such transfer except the plaintiff; I do not see how the general term could grant a new trial in this case without disregarding the statute, and returning to the doctrine of Chancellor KENT in *Reade v. Livingston*.

I think the doctrine of *Hinds' Lessees v. Longworth* (11 Wheat., 199); of *Jackson v. Post* (15 Wend., 588); of *Salmon v. Bennet* (1 Conn., 525), is substantially the doctrine of Judge SPENCER in *Verplanck v. Sterry* (*supra*), and that doctrine certainly does not interfere with the conclusion of fact, to which the referee arrived as to the transfer of the property in 1855. The question really is, and must be in such cases, considering the amount of debts and the value or amount of the property retained, and all the other circumstances of the case, is the conveyance or transfer fraudulent?

I think, in this case, the facts and circumstances and the law justified the referee's conclusion; but if the general term thought he might have come to a different conclusion, I do not see upon what principle they granted a new trial. The view I have taken of the question has been the most favorable for the respondents, for I have assumed the transfer of the property to Mrs. Eckler, in 1855, to have been voluntary; but I am inclined to think that, on the facts found by the referee, Mrs. Eckler in equity would have been deemed a creditor of her husband to the amount of \$3,500. My conclusion is, that the order of the general term, granting a new trial, should be reversed, with costs.

SMITH, J., dissented; SELDEN, Ch. J., did not sit in the case.

Judgment at special term affirmed.

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194	685

The granting of a new trial in a suit before a justice of the peace, under section 366 of the Code, is matter of mere discretion, not reviewable on appeal.

This rule applies where the application for a new trial was on the ground that the summons had never been served and the justice did not obtain jurisdiction. The County Court having denied a new trial except upon terms, the Supreme Court cannot review its order.

APPEAL from judgment in the Supreme Court reversing a judgment of the County Court.

The plaintiff commenced a suit by summons before a justice of the peace of Cortland county. The constable made due return of personal service of the summons and on the return day no one appearing for the defendant the justice proceeded with the case *ex parte*, heard the plaintiff's testimony and gave judgment for the plaintiff for forty dollars, besides costs. The defendant appealed to the County Court and there presented affidavits denying the service of the summons, upon which the County Court ordered a new trial on payment of ten dollars costs of motion within a period fixed in the order, and if not paid then the judgment was to be affirmed, with costs. The ten dollars was not paid and judgment of affirmance was entered, from which the defendant appealed to the Supreme Court. At a general term in the sixth district, the judgment of the County Court and that of the justice was reversed, and on an order made under the statute allowing an appeal to this court.

John H. Reynolds, for the appellant.

Amasa J. Parker, for the respondent.

SMITH, J. The return of the summons, with the indorsement of the constable thereon of due personal service thereof

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upon the defendant, conferred jurisdiction upon the justice over the person of the defendant, and authorized him to proceed with the trial of the cause and receive the plaintiff's evidence in support of his complaint, and to render judgment thereupon. (*Putman v. Mann*, 8 Wend., 202; *Allen v. Martin*, 19 id., 800; 2 Hill, 517; 18 Barb., 597.) The evidence received fully warranted the judgment rendered by the justice and no error occurred on the trial which could warrant a reversal in the County Court of such judgment.

The order made in the County Court granting a new trial upon affidavits of the defendant and others, showing that he purposely evaded the service of the summons when the constable came to his house to serve it, and locked his door and kept it locked, and ran out of one room into another so as not to hear what the constable said at the time, was certainly very lenient to the defendant, and presents no ground of error or exception on his part. Section 366 of the Code provides that "If the defendant failed to appear before the justice and it is shown by the affidavits served or otherwise that manifest injustice had been done, and the defendant satisfactorily excuses his default, the court may in its discretion set aside or suspend the judgment, and order a new trial before the same or any other justice, at such time and place and on such terms as the court may deem proper."

An application for a new trial under this section of the Code is addressed purely to the favor and discretion of the court. Such is the express provision of the statute, the court "may in its discretion set aside the judgment and grant a new trial." It is a fundamental rule governing the review by one tribunal of the proceedings of another that orders or decisions resting in discretion are not reviewable. The Supreme Court erred in reversing the judgment of the County Court. It was not entitled to review its decision on the questions presented in the affidavits, and they could not properly be used or considered on the merits of the case. The objection that a party should never be concluded or put to any damage by a judicial proceeding, when he has had no opportunity to be

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heard, is met by the legislature in this section of the Code giving a remedy to a party complaining of any error of fact not within the knowledge of the justice in the review or rendition of any judgment by a justice of the peace. The County Court can in all cases of this kind hear and determine the question upon affidavits, or may inquire into and determine the same upon the examination of witnesses.

Under this section the party injured may obtain redress of all errors of jurisdiction or regularity in the proceedings before the justice, and he will also have his remedy by action against a constable for a false return.

In the case of *Fitch v. Devlin* (15 Barb., 47), it was proved by affidavits that the summons was not served on the defendant, but the County Court held that the defendant had no relief except by an action against the constable for the false return. The Supreme Court reversed the judgment of the County Court and that of the justice on the ground that error of fact was clearly established, and the party had a remedy for such error under this section of the Code. If in this case the County Court had held that it had no power to hear and decide the question of error in fact upon the affidavits, it would have been proper for the Supreme Court to have reversed such decision and remitted the case to the County Court for the correction of such error. But the County Court did act; it heard the application and made the appropriate order in its discretion to give relief to the defendant. It granted a new trial and the defendant was bound to pursue that remedy—otherwise he is remediless so far as relates to any proceeding to review the judgment.

The judgment of the Supreme Court should be reversed and that of the County Court affirmed.

Judgment reversed.

Dows v. Greene.

DOWS *et al.* v. GREENE *et al.*

A shipping bill, executed by the owner of property and of the canal boat on which it is laden for transportation, stating that it is to be delivered as addressed, viz., "Account J. F. M., care of Dows & Cary," though not signed by the master of the boat, nor containing any words of negotiability, is substantially a bill of lading, and affects the title to the goods in the same manner as if it were in regular form.

Under such a bill, Dows & Cary are the consignees, and have a lien under the factors' act (chap. 179 of 1830), in respect to any money advanced by them to J. F. M.

It seems that, at common law, and independent of the factors' act, the transfer of a bill of lading to a *bona fide* holder would transfer the title in the same manner as a transfer of the goods, although the bill had been obtained from the owner of the property by fraud. *Dows v. Perrin* (16 N. Y., 325), in this respect questioned.

APPEAL from the Supreme Court. Replevin for two thousand five hundred and sixty-five bushels of corn, upon which the plaintiffs had made an advance of thirty-eight cents per bushel, for which they asserted a lien, under circumstances sufficiently stated in the following opinion. The reference therein to the case of *Dows v. Perrin* (16 N. Y., 325,) makes it proper to call attention to this diversity in the facts: In *Dows v. Perrin*, evidence was offered and excluded showing fraud on the part of Bloss, who, as agent of Mack, procured a bill of lading of the corn from a clerk who, as it then appeared, had no authority to execute such a bill. The existence of such fraud was, therefore, assumed in the decision. In this case, all fraud on the part of Bloss was disproved; and there was no evidence that Mack, his principal, was guilty of, or contemplated any fraud, at the time when the bill of lading was procured.

After the property was replevied, it was redelivered to the defendants, and the plaintiffs had a verdict for its value, at forty-four cents per bushel, instead of the amount of their advances. The judgment on the verdict was affirmed at gene-

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ral term in the third district, and the defendants appealed to this court.

William D. White, for the appellants.

Lyman Tremain, for the respondents.

DAVIES, J. This is an action for the claim and delivery of 2,565 bushels of corn, and damages for the detention. The plaintiffs claim as consignees, and as the *bona fide* owners and holders of the bills of lading thereof; upon which they had made advances. The facts in this and other cases, growing out of the same transactions appear in the reported cases of *Dows v. Greene* (16 Barb., 72), *Dows v. Perrin* (16 N. Y., 325), *Dows v. Rush* (28 Barb., 157), and *Dows v. Greene* (32 Barb., 490). This case has been retried before one of the justices of the Supreme Court, without a jury, who has found certain facts, which having been affirmed at general term, are conclusive upon this court. He finds that Niles & Wheeler, from whom both parties claimed title to the 2,565 bushels of corn in question, were partners, dealing in produce in Buffalo, during the year 1848, and were also engaged with one Caleb in the transportation business; and that Niles & Wheeler, as produce merchants, were the owners of the corn. That on the 7th of August, 1848, the corn was on board the lake boat *Montezuma*, and that on that day, one Bloss made a contract of purchase of the same, with Niles, one of the partners, for cash, half to be paid on Friday, the 11th, and half on Saturday, the 12th of August. That Niles & Wheeler were to ship the corn for Bloss on board the boats of the transportation company, owned by them and Caleb, for New York, and to transport the same there for thirteen cents a bushel, to be paid by Bloss. That the contract was in fact made by Bloss, as the agent of one I. F. Mack, but he did not disclose the fact of such agency until after the agreement had been made, and until after the bill of lading had been issued. In pursuance of this agreement the corn was transhipped from the *Montezuma*

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to the canal boat Neptune, on the 7th of August. That on that day Bloss obtained from Walker, a clerk in the office of Niles & Wheeler, a bill of lading for said corn, which stated that the corn had been "shipped in good order by Niles & Wheeler, agents, on board the boat Neptune, ———, master, marked and consigned as in the margin, to be delivered as addressed without delay." In the margin was as follows:

Account I. F. Mack, care of Dows & Cary.		Freight to New York, a bushel, 13 cents. [Signed] NILES & WHEELER. per E. H. WALKER.
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That Bloss obtained said bill of lading in good faith, and Walker had authority to execute it for Niles & Wheeler, and it was so in fact executed by Walker with the knowledge and sanction of one of the firm of Niles & Wheeler. That said shipping bill was by said Bloss, sent to Mack at Rochester, who, on the 8th of August, at Rochester, obtained from the agent of the plaintiffs there, an advance on said bill of lading, upon the faith thereof, and that such advance was made by the plaintiffs in good faith, upon said bill of lading, without any notice or knowledge of any kind to them or their agent of any fraud having been committed or intended by any one in the purchase of said corn, or in obtaining said bill of lading. That on the 10th of August, Bloss gave notice to Niles & Wheeler that he had not received the money from Rochester to pay for said corn, as he had expected, and for that reason could not complete the purchase for it, and then first informed them that he was acting as the agent of Mack in the purchase and not on his own account. Bloss proposed to Niles & Wheeler to send a man to Rochester to get the money, and if it could not be obtained, he would give up the corn. A person in the employ of Niles & Wheeler went to Rochester, and he and Bloss arrived there on the 11th, and found that Mack had failed and absconded the day previously, and had on that day made a general assignment. On the 12th of August, Niles & Wheeler assumed to sell the corn to Durfee & Co., who paid them for it, and they, Durfee & Co., delivered the

corn to the defendants. The judge found as conclusion of law that the plaintiffs were the consignees of the corn and obtained a lien thereon under the factor's act for the sum advanced upon the faith of the said bill of lading. That the plaintiffs as *bona fide* purchasers for value to the extent of their advances were entitled at common law, as well as under the statute, to the possession of the corn at the time of the commencement of this suit.

A similar transaction was under consideration in this court, in the case of *Dows v. Perrin* (*supra*). We then held that a paper similar in all respects to that in the present case, was a bill of lading, and it now being found as a fact, that Walker had authority to issue the bill for Niles & Wheeler, the objections to a recovery in that case, based on Walker's want of authority, have now no force or application. The bill of lading was therefore put in circulation by the authority of Niles & Wheeler, and we deem the law to be well settled that in such a case, a *bona fide* assignee for value, can hold the goods represented by the bill. We entirely concur in the wisdom and force of the remarks made by Lord CAMPBELL in *Gurney v. Behrend* (3 Ellis & Bl., 622), that ever since the great case of *Lickbarrow v. Mason*, the law has been considered to be that the *bona fide* transferee for value of a bill of lading, indorsed by the shipper or his consignee, and put into circulation by the authority of the shipper or consignee, has an absolute title to the goods freed from the equitable rights of the unpaid vendor to stop *in transitu* as against the purchaser, and we believe it to be of essential importance to commerce that this law should be upheld."

But the facts found by the referee bring the present plaintiff directly within the protection of the factor's act. In this case, the corn was shipped in the name of Mack and he is to be deemed the true owner, so far as to entitle the plaintiffs, who were the consignees thereof, to a lien thereon for the money advanced by them for the use of Mack, in whose name the shipment was made. Such lien is not impaired by the second section as it is proved as matter of fact, that the consignees

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had no notice by the bill of lading or otherwise, at or before the advancing of the money, or at or before the receipt thereof by Mack, in whose name the shipment was made, that he was not the actual and *bona fide* holder thereof. (Chap. 179 of 1880.) The judgment appealed from should be affirmed, with costs.

SMITH, J. The case of *Dows v. Perrin* in this court (16 N. Y., 325), decides that the paper executed by Walker in the name of Niles & Wheeler, and delivered to Bloss, and subsequently indorsed by Mack to the plaintiff's firm, was a bill of lading. The paper upon which the plaintiff's title to the corn in question depended in that suit was in the precise form with the one given in evidence on the trial of this action, and the same relate to, and are part and parcel of the same transaction. The only difference between them consists in the fact that the quantity of corn specified in them is different and also the name of the boats in which it was shipped. That question must therefore be deemed *res judicata*.

It was also decided in that case that upon the proofs given on the trial there was no satisfactory evidence that Walker had authority to execute said bill of sale in behalf of Niles & Wheeler, and that as the paper purported to be executed by an agent it was incumbent upon the plaintiff to prove that he was duly authorized to execute the same for his principals. It was therefore held that the circuit judge should have decided as matter of law that Niles & Wheeler are not bound by such bill of lading and the plaintiff should have been nonsuited.

On the trial of this action which took place since the decision of *Dows v. Perrin* the plaintiff gave evidence tending to establish the authority of Walker, and the judge before whom the case was tried without a jury, finds as matter of fact "that Walker had authority to execute it (the bill of sale) for Niles & Wheeler and that it was in fact so executed by Walker with the knowledge and sanction of one of the firm of Niles & Wheeler." Assuming this finding on the facts to be conclusive on that question, it remains to consider what legal

inferences are deducible therefrom in connection with the other facts in the case.

The first inquiry that suggests itself is, what is the force of the bill of lading thus established. Niles & Wheeler were the vendors of the corn, and they the carriers or agents for the carriers. This bill of lading therefore executed by them imported a sale of the corn to Mack, and a delivery to, and receipt of, the same by them for the transportation company of which they are the members and agents, for transportation to New York, with a consignment of the same to Dows & Carey, the plaintiff's firm. This bill of lading is dated August 7, 1848. It was delivered to Bloss the same day and sent to Mack at Rochester who on the next day (August 8) indorsed it to Dows & Carey and delivered it to their agent Chappell and procured his indorsement of a draft then and there made by him upon the consignees, which he caused on the same day to be discounted at Bank, and then and there received the proceeds thereof. The plaintiff's firm therefore upon the faith of this bill of lading, and another of the same date and import for corn shipped on the boat Cuba, advanced Mack \$1,800, on the 8th of August. Mack having thus obtained these bills of lading and on the faith of them large sums of money upon drafts upon Dows & Carey fails and absconds on the 10th of August. Which of these parties, the vendors of the corn or the plaintiff's firm must sustain the loss is the question practically involved in our decision.

It is claimed by the appellants that Mack having obtained the bill of lading fraudulently, the title to the corn never passed to him, and that he could not transfer any title to it by the assignment of the bill of lading. A bill of lading doubtless is not negotiable like a bill of exchange. But to a certain extent it is a substitute for the property embraced in it, and is transferable, and its assignment and delivery is equivalent to a sale and delivery of the property. (*Fitzhugh v. Williams*, 5 Seld., 565; *Gibson v. Stevens*, 8 How. U. S., 399.) Its delivery is symbolical of the property, and the title passes by delivery of the bill of lading wherever it could pass by

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bill of sale of the property, accompanied by actual delivery.

A person who had stolen a bill of lading could not assign it so as to pass the property, any more than a person can give title to stolen property, or property tortiously taken.

It is a fundamental rule in the law of property, that a man cannot be deprived of his property without his consent or fault. But when he has consented to part with the possession of his property upon a contract of sale, and actually delivers it, though it be to a fraudulent vendee, the title passes and he may lose it, and will if the fraudulent vendee, before he rescinds the contract, or reclaims the property, or stops it *in transitu*, sells it to a *bona fide* purchaser.

A contract of sale, infected by fraud, is valid as against the party committing the fraud, and is valid to pass and to protect a transfer of the property when there is an absolute delivery as against the vendor till it is rescinded. As against him and in his favor, it is a voidable contract, voidable at his election; as against all other persons it is a valid contract until rescinded. (*Muna v. Walsh*, 8 Cow., 238; *Evans v. Saltus*, 12 Pick., 306; 20 Wend., 272.)

Now I conceive that the same rule applies to this bill of lading that would apply to a case of sale and delivery of personal property. It is not, strictly speaking, negotiable in a commercial sense; but it is assignable like any common law security. It is just as capable of transfer as is the property specified in it. The corn mentioned in this bill of lading was a vendible commodity. This bill of sale represents the corn. An assignment and delivery of the bill of lading is equivalent in legal force to the sale and delivery of the corn. It is documentary evidence of title in and to the property specified in it, and conclusive as against all the parties to it in the hands of a *bona fide* holder. Such is the rule of the common law as settled in numerous cases and recognized since the celebrated case of *Lickbarrow v. Mason* (2 Term, 68; *S. C.*, H. Bl., 892; 6 East., 21). In that case ASHHURST, J., said "The delivery of the bill of lading, as between the vendee

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and third persons, is a delivery of the goods themselves." GROSS, J., said "The question was whether the bill of lading transfers the property. I think it does." BULLER was of the same opinion. This case was greatly discussed and carefully considered, was reviewed in the Exchequer and in the House of Lords, and is generally considered as settling two questions; first, that the unpaid vendor may stop the goods *in transitu*, upon the insolvency of the vendee; secondly, that this right of stoppage *in transitu* will be defeated by the transfer of the bill of lading to a *bona fide* indorsee before the right of stoppage is exercised; the assignment of the bill of lading, in such case transferring the property. (1 Smith's Leading Cases, 879.)

And this rule stands, it seems to me, upon impregnable ground in equity — upon the principle that whenever one of two innocent persons must suffer by the act of a third, he who has enabled the third person to do or occasion the injury, or commit the fraud, if it be one, must sustain the loss. The application of this plain principle of equity will cast the loss in this case upon the vendors, Niles & Wheeler.

Upon the finding upon the facts they are responsible for the existence of this bill of lading — for its delivery to Bloss — for its possession by Mack. They did contract to sell the corn to Bloss. They did deliver it on board the canal boat on the 7th of August, when it was not to be paid for till the 11th or 12th, and in transportation, and they suffered the boats to leave Buffalo for their destination with the corn on board under the bill of lading. They thus put it in the power of Mack to procure credit on the faith of the bill of lading, and to secure an advance upon the corn from the consignee and commit the fraud. Upon these facts, Niles & Wheeler should be held concluded by their bill of lading, and should be deemed estopped from setting up, as against an innocent consignee, that the same was procured by fraud, or that the sale of the property was conditional, and that the title never passed to Mack. They have certified in their bill of lading that they had received this corn from Mack to transport to Dows & Co.,

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the consignees, and cannot be permitted to falsify their own written statement. So far as the question depends upon the rules of common law, as deduced from the decided cases, the rights of the consignees to this property are superior to those of the vendors.

But if this were not so, I do not see how the appellants could escape the effect of the act in relation to principals and factors and agents, passed April 16, 1880 (chap. 179, p. 203). The first section is as follows:

"SEC. 1. After this act shall take effect every person in whose name any merchandise shall be shipped, shall be deemed the true owner thereof, so far as to entitle the consignee of such merchandise to a lien thereon; 1st, for any money advanced, or negotiable security given by such consignee to or for the use of the person in whose name such shipment shall have been made: and 2d, for any money or negotiable security received by the person in whose name such shipment shall have been made to or for the use of such consignee." This act was not referred to in the decision of the case of *Dows v. Perrin*.

The finding on the facts that Walker was authorized to sign this bill of lading, makes it the act of Niles & Wheeler. The plaintiffs accepted negotiable drafts and paid them on the faith of this bill of lading, and are expressly and distinctly within the protection of this act. The drafts were made by Mack, on the 8th of August and indorsed by Chappell for plaintiffs' benefit and discounted on that day. The plaintiffs were bound to accept on their contract made with Mack and Chappell, and after the discount of the drafts could not refuse to pay them. They were bound to pay them to protect Chappell, who was their agent, and acting for their benefit in the transaction.

A single point remains. It is claimed that the recovery is excessive, and that the plaintiffs should only have recovered the amount of their advance. The property was not delivered to the plaintiffs. The proper judgment, therefore, was for the recovery of possession of the property, and in case a delivery of the said property cannot be had that the plaintiffs recover

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the value thereof. Such is the judgment. But the plaintiff has no claim to anything further than to receive the amount of his advance and damages for detention, and beyond that the equitable interest in the property belongs to the general owners or the defendants as their representatives. The value was assessed at the full value of the property instead of the plaintiffs' special property. This, I think, was the proper measure of value. *Fitzhugh v. Wyman* (5 Seld., 599), where, as in this case, the plaintiff has only a special property. But no question of this kind was made on the trial, and the value was assessed at 55 cents instead of 38 per bushel, without objection or exception. The excess that the plaintiffs may recover will belong to Messrs. Niles & Wheeler, as the general owners or their consignees, but the error cannot now be rectified in this action.

The judgment of the court below, should therefore be affirmed.

DENIO and SUTHERLAND, Js., did not concur in the opinion that the title to the corn would have passed had the bill of lading been procured by fraud. They put their concurrence upon the ground that the plaintiffs were within the protection of the factors' act. SELDEN, Ch. J., did not sit in the case.

Judgment affirmed.

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HULL, Administratrix, v. HULL et al.

Bequest of personal property to executors in trust to pay an annuity of five hundred dollars, to be increased in their discretion to one thousand dollars, to the testator's son till he attained the age of thirty, and to pay all that should remain of principal and accumulated income to the son upon the condition that he should then, in the opinion of the executors, be solvent. The executors having renounced — *Held*:

The provision for the increase of the son's annuity became ineffectual, the discretion being absolute and personal.

The determination as to solvency of the son at the age of thirty is not a matter of personal discretion; but, as it rests upon a fact judicially

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ascertainable, effect is to be given to the provision, notwithstanding the renunciation of the trustees.

The provision for the accumulation of income during the interval between the son's majority and the age of thirty years is void, and the income for that period goes as in case of intestacy.

APPEAL from the Supreme Court. Action to obtain the judicial construction of a will. The testator devised his real estate to his wife for life, and his personal estate to his two half-brothers, his executors, upon trusts which are stated in the following opinion. There were directions for the payment of an annuity to his widow, and certain small legacies, as to which no question was made. The executors having renounced, letters of administration with the will annexed were issued to the widow, by whom this action was commenced. During its pendency, the executors filed a renunciation of all right as trustees.

Alexander W. Bradford, for the appellant.

Augustus Prentice, for the respondent.

WRIGHT, J. The testator died seised of real estate (a house and lot in St. Mark's Place, in the city of New York), of the value of \$12,000, and possessed of about \$160,000 of personal property. He left a wife and only son, a minor, surviving him. His will clearly indicated this child as the primary object of his bounty. The aim of the testator was to give ultimately to his son all his property, but to keep the bulk of it from his possession until he arrived at the age of thirty years. To effectuate this intent the estate was given in trust to the executors (the brothers of the testator) named in the will; and the instrument provided that such executors should pay to the guardian of the son the sum of \$500 per annum during his minority; which annual sum might be, in the discretion of the executors, increased to any sum not exceeding \$1,000 per annum. When the son became of lawful age the executors were to pay over to him the sum of \$5,000 in money from

the avails of the testator's estate in their hands, and also continue the yearly allowance of \$500 and not exceeding \$1,000, until he arrived at the age of twenty-five years, then the executors were to pay over to him the farther sum of \$10,000, and were authorized to continue or not, in their discretion, the yearly allowance until he arrived at the age of thirty years. When he reached the age of thirty years, the executors were to pay over, transfer and convey to him all the rest, residue and remainder of the testator's estate in their hands, not otherwise by the will devised or bequeathed; provided, however, and upon the express condition that the son was then, in the opinion of the executors, solvent and able to pay all his debts and liabilities of every kind. Should he, however, in the opinion of the executors, be then insolvent and unable to pay all his just debts and liabilities, the executors were to pay to him yearly the interest and income of the residue and remainder of the testator's estate, until he should, in their opinion, become fully solvent and able to pay his just debts and liabilities of every kind, when they were to pay over and transfer to him such residue and remainder. A subsequent clause of the will provided, that in case the son should die unmarried and without lawful issue, before coming into the possession and enjoyment of such residue and remainder, then and in that event the executors were to pay over and distribute the whole of the testator's estate not distributed (including that to be distributed on the death of the widow or other contingency provided for) equally among all the children of the testator's father, and their children *per stirpes* if any were dead leaving issue. Should the son, however, die, leaving a wife and no children, before coming into the possession and enjoyment of the testator's estate, pursuant to the provisions of the will, then the wife, so surviving, was to receive the same portion of the testator's estate and property that she would have had, had the son lived long enough to have come into the possession and enjoyment absolutely of the whole of the testator's estate and property designed by the will to be given to him.

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We are to give effect to the intention of the testator, if it can be done consistently with the rules of law; and not by construction, though we might deem a testamentary scheme which proposes to keep the testator's only son in guardianship until he reaches the age of thirty years, with title in abeyance, objectionable, to make a new or different will for him. Still if there are any provisions of the instrument, which conflict with settled legal principles or positive statutory enactment, or which have become ineffectual and inoperative for any valid reasons, they must fail.

The fifth clause of the will gives the testator's estate to his executors in trust for the payment of debts and to carry out the provision of the preceding clauses; and they were to manage it in a way best adapted to that end. The third clause in effect contains a direction to accumulate the income of such estate until the son shall attain the age of thirty years. This provision is invalid, and the accumulation void so far as respects the income between the son's majority and his attaining the age of thirty. The statute authorizes an accumulation of personal property (which was this case) during minority, for the benefit of the minor; but it must terminate at the expiration of minority. (1 R. S., p. 720, § 37, p. 774, § 3.) The accumulation was not unlawful during the minority of the son, but was, subsequently to his attaining majority. These after accumulations being void, the decedent is to be regarded as having died intestate, as to the income of his estate between the majority of the son and his attaining the age of thirty years. This was the construction given to the provision by the court below; and its judgment now appealed from provides that the income of the entire estate shall accumulate (after taking therefrom the annuities to the wife and son) until the latter arrives at the age of twenty-one years, when the same is to be paid over or appropriated annually, one-third to the widow and two-thirds to the son, until the son shall attain the age of thirty years.

On attaining majority the son was to receive \$5,000 from the testator's estate and a further sum of \$10,000 on reaching

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the age of twenty-five; besides an annual allowance of not less than \$500 which might be increased to \$1,000 in the discretion of the executors. He was to have no more of the estate until he reached the age of thirty. This latter period was fixed for his coming into the full and absolute control and enjoyment of the entire property of the testator not otherwise devised or bequeathed. Whether, however, he should then take the property, absolutely, and disencumbered by any trust, depended upon a contingency. The testator had imposed as a condition of his taking at that time that he should be solvent and able to pay all his debts and liabilities of every kind. It is not pretended that the condition could not be lawfully imposed; but the ground assumed is that the testator had submitted the determination of the fact of solvency to the personal discretion of the executors named in his will, and as they voluntarily renounced, there is no way that the condition can be complied with, and the entire provision necessarily becomes inoperative. I cannot concur in this view. The testator had declared his will as to the time when, and the condition upon which, his son should be vested with the possession and absolute ownership of the bulk of his estate; and it is not to be intended that he meant that he should be kept out of such estate a moment after he reached the age of thirty years, provided he was then, in fact, solvent. He could not have meant that the executors he had appointed should be the sole judges of the question of the son's solvency on arriving at thirty years of age, and thereby, though the son should not in fact owe a dollar, enable such executors to keep the estate from him, by deciding him to be insolvent. It is true that the words of the will are that the son is to take, at the age of thirty years, if he be solvent and able to pay all his debts and liabilities of every kind, "in the opinion of my said executors;" but the legal effect of this is not to leave the question of solvency to be determined or decided entirely by the personal discretion of the executors. It may be conceded that when a matter or thing is to be determined or decided entirely by the personal discretion of one or more parties,

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and they die or refuse to exercise this discretion, there is no way any determination or decision can be made. That provision of the present will which confides to the discretion of the executors an increase of the annual allowance to the son is of this description. But where a direction in a will is, that the executors or trustees are to do or to determine upon any particular thing, and a rule is given, based upon facts readily ascertainable in the usual manner of legal determination of facts, then it is not a case of pure personal discretion, and the courts will uphold the will, and order the facts, if disputed, to be determined in the usual way. A rule is given in this will, based on facts, which facts, I think, are to be the guide and not the discretion of the executors. The persons to whom, the time, amount and conditions upon which the estate is to be finally disposed of are all plainly fixed by the will.

I concur, therefore, with the Supreme Court that the provision as to the disposing of the residue of the testator's estate to the son, on the latter reaching the age of thirty, and being solvent, is valid and operative, and does not become ineffectual and inoperative, for the reason that the persons named in the will as executors have renounced. By a fair construction of the will, the decision of the fact of solvency is not confided to the exclusive personal discretion of the executors. It is a fact, if disputed, to be determined as other facts are legally determined.

There is no valid objection to the eighth clause of the will. It is a direction that the children of the testator's father shall take the estate absolutely in the event of the son dying unmarried and without lawful issue before coming into the possession and enjoyment of it, pursuant to the provisions of the will. It is urged that this limitation is void, for the reason that it is based upon a prior scheme or plan that cannot be carried out, and the failure of which involves the failure of any subsequent conditions based upon it. The argument is, that the limitation was framed on the validity, and not the invalidity of the previous clauses of the will, disposing of the testator's estate to his son, and then being invalid or inope-

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rative, and the scheme failing, the limitation must fail. Undoubtedly, if the provision disposing of the testator's estate to his son, on his attaining the age of thirty years, had been invalid or become inoperative, and there had been an intestacy as to the bulk of the estate, the limitation in the clause under consideration would have failed. But here the intention of the testator, and his scheme for effecting it, are valid and operative, with the exception of the accumulation of income between the majority of the son and his attaining the age of thirty years. There is no failure in the intention or scheme of the testator further than to keep from the son, the possession and absolute enjoyment of the accumulations of the income of the estate until the latter reached the age of thirty years. I cannot think that there is any force in the suggestion, that because the plan or scheme of the testator, in all its parts, cannot be legally carried out, though in all essential particulars full effect is given to it, the limitation in question should fail.

These views, if correct, would lead to an affirmance of the judgment of the Supreme Court.

Judgment affirmed.

RUSE v. THE MUTUAL LIFE INSURANCE COMPANY.

34	653
116	397

Is a prospectus, distributed by a life insurance company, admissible to vary a provision in a policy issued by it? A disposition indicated to re-examine this question, discussed between the same parties (23 N. Y., 516).

MOTION for a reargument, upon the ground that certain recent English decisions upon one of the points involved had not been brought to the attention of the court.

John W. Edmonds, for the motion.

Akin C. Bradley, opposed.

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DAVIES, J. A motion is made for a reargument of this case. It was disposed of by this court upon two points (28 N. Y. 516):

1. That a prospectus, distributed by a Life Insurance Company, stating that a party neglecting to settle his annual premium within thirty days after it is due forfeits the interest in his policy, was inadmissible to vary or control an express provision in a policy for life, that it should cease and determine in case of a failure to pay the premiums according to the terms of the policy. The policy declared that if the annual premium was not paid on or before the 10th day of April, in each year, during the continuance of the policy, it should cease and determine.

2. That a recovery cannot be had upon a life policy, where the party taking it out does not prove an interest in the life insured. In this case the plaintiff gave no evidence of any pecuniary interest in the life of Bugbee, whose life he insured, or of any relationship to him.

Both these points were considered and decided by this court. The motion for the reargument is based upon the ground that the attention of the court was not called to several decisions in England, where a contrary rule had been adopted in reference to the prospectus issued forming a part of and controlling the terms and conditions of the policy. The cases referred to, *Wood v. Dwarries et al.* (11 Exch., 498); *Wheelton v. Hardisty* (92 Eng. C. L., 231); and *Collett v. Morrison* (9 Hare, 173), do certainly hold, that the prospectus might equitably be regarded as forming a part of and controlling the terms of the policy. It is not improbable that an examination of these cases would have led this court to a different conclusion than the one it arrived at upon this point. If this had been the only point upon which the case had turned in this court, it might have felt inclined to have ordered a reargument, and permitted the parties again to discuss it, and have reviewed our opinion in the case. But this court held the second point fatal to the plaintiff's recovery in this case, and no suggestion is now made, that upon this point any mistake or error has

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been committed. It was carefully considered and is fully discussed in the opinion, and we see no reason for permitting it to be reopened and reconsidered. If we should come to a conclusion upon a reargument favorable to the plaintiff upon the first point, it would not avail him anything, as our decision upon the second point would remain adverse to him, and would necessarily control the disposition of the case.

The motion for a reargument is therefore denied, with costs.

Motion denied.

CARPENTER v. THE OSWEGO AND SYRACUSE RAILROAD COMPANY.*

Ejectment lies by the owner of the fee in land subject to a public easement, against a party appropriating it to private occupation.

The laying down in a street by a railroad corporation of its track and rails is such an exclusive occupation as to give an action to the owner of the fee, although the track has not been used, nor connected with other portions of the railroad which were in use.

24 655
170 804

APPEAL from the Supreme Court. Ejectment for a strip of land, fifty feet long and thirty-eight feet wide, in the city of Oswego. Defence, that the land was part of a public street, and that the occupation of the defendant was by the permission of the municipal authorities. The trial was before a referee, whose general report was that the plaintiff had an estate in fee in the land, and that the defendant was wrongfully in the possession thereof. In his finding of facts he stated that the defendant, in October, 1853, laid down a single railroad track across the plaintiff's land in the street called the "Extension of Water street;" that it had not used the track, and had not used the land described in the complaint, or any part of it, except by laying down the track aforesaid; and that "the

* Decided at December Term, 1861.

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defendants do not connect with the track laid across said lot.' Upon the trial, documentary evidence was given to show the appropriation of the land in question by the city authorities for a street; and it was proved that the street was opened and worked under color of such appropriation. The plaintiff disputed the validity of the appropriation. The defendant insisted that no such possession or occupation by it was shown as would sustain the action of ejectment, and that it claimed no title or interest in the land to the exclusion of the public; that no judgment which the plaintiff could get would give him a right to the premises, as the public would still be entitled to use them as a street. The Supreme Court, at general term in the fifth district, reversed the judgment entered by the direction of the referee for the plaintiff, and ordered a new trial. The plaintiff appealed to this court.

Lyman Tremain, for the appellant.

Edwin Allen, for the respondent.

DAVIES, J., discussed the question as to the validity of the proceedings instituted by the corporate authorities of Oswego to appropriate the land in question for a street, and arrived at the conclusion that they were defective and gave no title to the city or the public. As this point was not passed upon by the court, his remarks are omitted. The learned judge then proceeded:

The only remaining question for consideration is, whether the action of ejectment is the plaintiff's proper remedy. It is conceded that the defendants entered upon the premises in question and constructed and laid thereon their railroad track. In their answer they state that, if said piece of land is occupied and possessed by them, it is so occupied and used by the permission and consent of the common council of said city of Oswego. As we have seen, the common council had no power to grant any right to the defendants to occupy the plaintiff's land; and their possession, under such license, conferred upon

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them no legal right. It is not pretended that the plaintiff ever gave any permission to occupy the lands in question.

That the defendants entered upon the plaintiff's land, took possession thereof, and erected thereon their railway, affixing the same to the soil, are facts undisputed. The referee has found, as matter of fact, that the defendants are in possession of the premises described in the complaint; and the judgment entered on his report not having been reversed on a question of fact, this court are concluded by the fact as thus found. The action is properly brought against the actual occupant, in pursuance of the provisions of the Revised Statutes. (8 R. S., p. 592, § 4.) If the premises were not actually occupied by the defendants, as it is now claimed, then, by the provisions of the same section, it may be maintained against any person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein. Now, it is unquestionable that the defendants, at the time of the commencement of this suit, were exercising acts of ownership on the premises claimed, or claiming some interest therein. It has long been the well-settled and recognized rule in this State that an ejectment will lie for anything attached to the soil of which the sheriff can deliver the possession. (*Jackson v. May*, 16 Johns., 184.) Testing the present case by this rule, there is no difficulty in the sheriff delivering to the plaintiff the premises claimed, and which are found to be in the possession of the defendants.

The order of the general term, reversing the judgment of the special term, and granting a new trial, should be reversed, and the judgment given for the plaintiff by the special term be affirmed, with costs.

MASON, J., concurred. JAMES, J., concurred in the opinion that the land in question was not legally appropriated as a street; but he thought the act of the defendant was a mere trespass, and that no case was made to sustain ejectment. HORT, J., thought the question whether the *locus in quo* was a street was not in the case. Ejectment lies to recover the plain-

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tiff's land, although it were in a street; and the act of the defendant is a sufficient occupation by it to support the action. COMSTOCK, Ch. J., SELDEN and DENIO, Js., concurred with HOYT, J. LOTT, J., also concurred in the opinion that the action of ejectment was a proper remedy to recover land, though subject to public use as a street; but he agreed with JAMES, J., that there was no such occupation by the defendant as would sustain that action against it.

Judgment reversed, and judgment at special term affirmed.

24 658
156 605

24 658
170 *804

MAHON, Executrix, et al., v. THE NEW YORK CENTRAL RAILROAD COMPANY.*

Where land has been taken for a turnpike, and afterwards transferred, by legislative authority, to a railroad company, without compensation by the latter to the owner of the fee, he may maintain successive actions for damages resulting from such occupation, as a continuing nuisance. The use of the land for a railroad is totally different from that public right of passage for which highways were designed.

ACTION for damages from the construction by the Utica and Schenectady Railroad Company (to whose rights and liabilities the defendant had succeeded), of an embankment in front of two houses of John Mahon, the plaintiffs' testator, in the village of Herkimer, and partly on the lands of said Mahon, by which he was deprived of the use of the highway called the Mohawk turnpike, which ran immediately in front of the dwelling-houses, and by reason of which the houses and lots aforesaid were frequently inundated and the dwellings rendered damp. Damages were also claimed for the construction and operation of a railroad upon the land of the testator, extending to the middle of the highway in front of his dwellings, without purchasing the land or causing the testator's damages to be

* Decided at March Term, 1860.

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assessed. One of the defences was, that, in July, 1842, John Mahon, the plaintiffs' testator, commenced an action in the Supreme Court for the same causes of action as those stated in the complaint in this suit. The action thus pleaded in bar is the same reported in Lalor's Supp., 156. Upon the trial, the plaintiffs proved title in their testator by deed dated April 22, 1830, to half an acre of land, the northerly line of which is therein described as "running along the turnpike-road six rods;" and that, from the date of said deed, which was before the construction of the railroad, until his death, John Mahon continued in possession. The turnpike was north of Mahon's land, and its grade was two and a half feet lower than the lots. In 1836, the Utica and Schenectady Railroad Company, in pursuance of an act of the legislature requiring it to do so, purchased all the rights of the Mohawk Turnpike Company, which was incorporated April 4, 1800. In constructing the railroad along the turnpike, an embankment was made, raising the grade two and a half feet higher than the lots of Mahon, and a single track was laid upon it. It was for this occupation of the land that the action pleaded in bar by the defendant was instituted. Subsequently, in 1847, the embankment was widened so as to approach nearly to Mahon's dwellings, its height increased, and an additional track was laid thereon. Before the widening of the embankment, there was room for the passage of carriages between the same and Mahon's fence; but after the laying of the second track, this was impossible. The plaintiff was nonsuited at the trial; and the judgment in favor of the defendant having been affirmed at a general term in the fifth district, the plaintiffs appealed to this court.

Robert Earl, for the appellants.

John H. Reynolds, for the respondent.

CLERKE, J. If the plaintiffs' testator could have recovered all that he was entitled to in the first action, it is, of course, a bar to the second. And this depends, chiefly, though not altogether, upon the question whether the Utica and Schenec-

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tady Railroad Company in any way transcended the authority constitutionally vested in them by the legislature. If they did, their road is a nuisance—a perpetual nuisance; and every day's continuance of it is a legal wrong, for which they are liable in damages after they have accrued. If they did not transcend their authority, and yet, in constructing their road, have necessarily injured the rights of others, they are equally liable to respond for prospective as well as accrued damages; and, in such case, they cannot be vexed again in a second action.

Did the Utica and Schenectady Railroad Company transcend the authority constitutionally vested in them by the legislature? If the plaintiffs' testator owned the fee of the land over which the Turnpike Company's road ran, at the time of the transfer of the road to the Utica and Schenectady Railroad Company, it could not be taken away from him without causing his damages to be assessed and paid; and the illegal appropriation of it would make them liable for damages in successive actions as the damages accrued. It seems to be admitted that no such damages were assessed or paid.

The rule that owners of land bounded on public highways *prima facie* own the land to the centre of the highway is not alone applicable to ordinary highways, but also to turnpikes (*Hooker v. The Utica and Minden Turnpike Co.*, 12 Wend., 371); and although the general act relating to turnpike companies passed March 13, 1807, declares, when the president and directors pay the owners of the lands the sums assessed and awarded by the appraisers in their inquisition, they shall have and hold to them, and their successors and assigns forever, the lands and tenements described in their inquisition; yet it has been always held that this and the special act of incorporation vests in the company the title to the lands over which the road passes only for the purposes of the road, and, when the road is abandoned, the land reverts to the original owners. The company only acquired such an estate in the land taken by it as was necessary to fulfill the end and intent of the corporation, and could hold it to no other use, intent or

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purpose. Having ceased to occupy the land in question for the purpose of a turnpike road, the Mohawk Turnpike Company, in transferring it, in effect abandoned it; and, although they were authorized by the legislature to transfer it to the Utica and Schenectady Railroad Company, this could not, constitutionally, deprive the original owners of the land of their right of reversion, without compensation. (*Davis v. The Mayor, &c., of New York*, 14 N. Y., 526; *Williams v. The N. Y. C. R. R. Co.*, 16 id., 97.) An easement for the purpose of a highway does not authorize, as against the proprietor of the soil, the laying down of a railroad upon the track of the highway. The use of the land for a railroad is totally different from that public right of passage for which highways were designed.

The Railroad Company, therefore, having, without compensation to those entitled to the reversion of the land, constructed, maintained and operated their road upon the highway in question, acted and continued to act unlawfully, and are liable to damages from time to time as they accrued; and, on this ground, the second action is maintainable.

The learned judge then discussed another ground on which he thought the action maintainable, notwithstanding Mahon's recovery in a previous suit, viz., the enlargement and raising of the embankment in 1847 was a new injury for which compensation could not have been recovered in the first action.

WRIGHT, J., was for reversal, on the ground last stated; but SELDEN, DENIO, DAVIES and WELLES, Js., without passing upon that question, were for reversal on the ground first stated, that the appropriation of the land for a turnpike did not authorize its use for a railroad. COMSTOCK, Ch. J., and BACON, J., did not sit in the case.

Judgment reversed, and new trial ordered.



INDEX.

A.

ABANDONMENT.

See SHAMER'S WAGES.

ACCOUNT.

1. The action of account, at common law, would only lie between two merchants. It was unavailable where the partnership consisted of a larger number. *Appleby v. Brown*, 143
2. The Revised Statutes (2 R. S., p. 385, § 49), though implying a different understanding on the part of the legislature, did not change the law or enlarge the cases in which the action might be brought. 143

ACCUMULATION.

See TRUST, 1, 8.

ACTION.

[On implied agreement.]

1. A will gave all the testator's real and personal estate, and declared

that the donee was to pay all the testator's debts and a certain annuity. The acceptance of the gift creates a personal liability upon which an action can be maintained at law without any express promise. *Gridley v. Gridley*, 130

[Right of, when not waived.]

2. The owner of such chattels, who states his claim and forbids the sale, may purchase the property without impairing his right of action for the trespass. *Ford v. Williams*, 359

[For taking a chattel not identified.]

3. In an action, under the Code, for damages for the conversion of a billiard-table, the plaintiff is entitled to recover upon proof of the detention of four tables, assumed to be of equal value, to some one of which the plaintiff had title, though the particular one had in no manner been designated, except upon the notion that the defendant must have taken some three of them before removing the fourth, and thus selected those three as his own. *Clark v. Griffith*, 595

[Assignability of.]

4. That a complaint, under the Code, states fraudulent representations of the defendant, by which the plaintiff was induced to pay him money, which he seeks to recover back, does not necessarily stamp the action as one in tort, or show that the cause of action is not assignable. *Dyckie v. Wood*, 607

5. It is no objection to a recovery in such a case that fraud is not proved, if sufficient facts appear to warrant a recovery as for money had and received. *id*

6. Nor is it an objection to the assignability of the cause of action that the party paid the money under a sealed agreement, and signed admissions that the several accounts upon which he made payments were correct. *id*

See MORTGAGOR AND MORTGAGEE, 4.

AGREEMENT.

[Construction of.]

1. A promise is to be interpreted in that sense in which the promisor knew that the promisee understood it. *Barlow v. Scott*, 40

2. Accordingly, where the vendor of land undertook to execute such a conveyance as he had received from his grantor, which he said was a warranty deed — the same, in fact, containing only a covenant against the acts of the grantor — the purchaser, although he saw the deed under which the vendor held, understood it to be, and understood the vendor to promise, a deed with general warranty,

and the vendor knew that such was his understanding: *Held*, that the vendor was bound to convey with general warranty. *id*

See ACTION, 1.

PAYMENT.

VENDOR AND PURCHASER.

APPEAL.

1. The granting of a new trial in a suit before a justice of the peace, under section 386 of the Code, is matter of mere discretion, not reviewable on appeal. *Wavel v. Wiles*, 635

2. This rule applies where the application for a new trial was on the ground that the summons had never been served and the justice did not obtain jurisdiction. The County Court having denied a new trial, except upon terms, the Supreme Court cannot review its order. *id*

See SURREGATE'S COURT, 5.

ASSIGNMENT.

1. An executor who was insolvent and indebted to the estate, having sustained a loss by fire, indorsed on his policy of insurance an assignment of it to himself as executor, and upon receiving payment deposited the money in a bank to his credit as executor: *Held*, an appropriation of it in payment of his debt. *Scrantom v. Farmers' & Mech. Bank of Rochester*, 424

2. It is no defence to the bank, against the claim of the estate, that it paid over the money upon the demand of a receiver of the

executor's property, appointed in the suit of another creditor. *id*

3. An assignment in trust for creditors is not rendered void by a provision giving the assignees (one of them being a lawyer) "a just and reasonable compensation for labor, time, services and attention," in the business of the trust. *Campbell v. Woodworth*, 304

4. This language is to be construed as meaning no more than the commissions fixed by law. *id*

5. The trustee under an assignment of land which is declared fraudulent at the suit of a creditor, is not bound to account for the rents received and applied according to the terms of the trust before the commencement of the suit, or the attaching of any specific lien on the lands. *Columb v. Read*, 505

See *HUBBARD AND WIFE*, 8.

ATTORNEY.

1. The attorney in an execution, who refused to state whether he directed the sale of particular chattels by instruction of his client, and challenged a suit against himself, is estopped from denying that he acted on his individual responsibility. *Ford v. Williams*, 359

B.

BANKRUPT LAW.

1. An assignee in bankruptcy, under the act of 1841, who has notice of a suit for the foreclosure of a mortgage pending against

the bankrupt, which he could defend in the name of the bankrupt, is bound by the decree, though not made a party nor intervening in the suit. *Cleveland v. Boorum*, 613

2. *It seems* that the assignee, or his grantees, if not foreclosed, were limited, by the eighth section of the act of 1841, to the period of two years for the commencement of an action to redeem the land mortgaged: *Per SUTHERLAND, J.; DEMIO, GOULD and ALLEN, Ja., concurring.* *id*

BANKS AND BANKING ASSOCIATIONS.

1. A provision in the articles of a banking association that the shares of its stock shall not be transferable until the shareholder shall discharge all debts *due* by him to the association, includes liabilities of the shareholder which have not matured. *Leggett v. Bank of Sing Sing*, 283

2. Such a provision creates a valid lien as against an assignee of the stock who takes with knowledge thereof, while the shareholder is under a contingent liability as indorser, and gives no notice to the bank of his claim until after the indorser's liability has become fixed. *id*

3. A dividend of the profits of a banking association, declared by the directors "payable in New York State currency," is payable in cash. The directors have no authority to declare it payable otherwise. *Ellis v. Chittenden Bank*, 543

4. Evidence of an understanding by the cashier that "State currency" meant country bank notes current in New York city at a discount of a quarter of one per cent, but not showing a general usage in that sense, is inadmissible. *id*

See TAXES AND ASSESSMENTS.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where the maker of a promissory note within this State removes therefrom, and continues to reside abroad until its maturity, the indorser may be charged without a demand of such maker or presentment at his last place of residence within this State. *Foster v. Julien*, 28

BILL OF LADING.

See FACTORS' ACT, 7.

BILL OF SALE.

See CONSTRUCTION OF WRITTEN INSTRUMENT.

BOND.

[Issued by town commissioners.]

1. The act (ch. 375 of 1852,) directing certain town commissioners to issue bonds "under their official signatures" is satisfied, it seems, by instruments not under seal, and payable to bearer. *People v. Mead*, 114

2. The decision in *Starin v. The Town of Genoa* (23 N. Y., 439,) reiterated, that a certificate, required by the statute, but not made evidence, that the taxpayers had assented to the issue of the bonds, is not proof for a *bona fide* holder of the fact of such assent. *id*

reiterated, that a certificate, required by the statute, but not made evidence, that the taxpayers had assented to the issue of the bonds, is not proof for a *bona fide* holder of the fact of such assent. *id*

BURDEN OF PROOF.

See STOCK-JOBBER ACT, 1.

C.

CANAL BOARD.

1. The canal board, upon reversing or modifying an award of the canal appraisers, must state the grounds of reversal or modification in their resolution. The statute (ch. 752 of 1849, § 4) is imperative, not merely directory. *People v. Gardner*, 583

2. The offering by one of the canal commissioners, at a meeting of the canal board, of a resolution, in writing, that an appeal be reheard, is an application in writing for such rehearing. *id*

CARRIER.

1. The carrier of a boat-load of wheat lost or converted a portion of it, and discharged the residue into a barge provided by an intermediate consignee for transporting it to its ultimate destination. The intermediate consignee refused to pay freight for the quantity delivered, unless the carrier would allow and deduct the value of the wheat lost. *Held*, that no contract to pay the freight was to be implied under these circum-

stances, and that an action therefor would not lie against the intermediate consignee. *Davis v. Puttison*, 317

2. An intermediate consignee is, in virtue of that character, authorized to adjust and receive damages from a loss of part of the property. *id*

3. The rights and duties of intermediate consignees discussed, *per ALLEN, J.* *id*

See NEGLIGENCE.

STATUTES, CONSTRUCTION OF, 1-4.

CERTIORARI.

1. A common-law *certiorari* to review a summary conviction under a penal statute brings up, not only questions affecting the jurisdiction of the magistrate and the regularity of the proceedings, but the question whether there was any evidence to warrant the conviction. *Mullins v. People*, 309

2. In such cases the evidence must appear on the face of the record, or the conviction will be quashed. *id*

See JUSTICE OF THE PEACE.

COMMISSION TO TAKE TESTIMONY.

1. A paper issued by a court of record in the form of a commission to take testimony, but without a seal, is a nullity, and depositions taken under it are not admissible as evidence. *Ford v. Williams*, 359

CONFLICT OF LAWS.

1. The rights of a wife, as creditor of her husband under the law of France, where the marriage was contracted, continue and attach to the property of the husband where he abandons her and dies domiciled in this State. *Bonati v. Welsh*, 157

2. Accordingly, where the husband had appropriated the proceeds of real estate inherited by the wife during coverture, and she was, by the French law, entitled to priority of payment out of his estate: *Held*, that such right to priority exists as against his legatees, though the property bequeathed had all been acquired by him in this State subsequent to his desertion of the wife. *id*

CONSIGNEE.

See CARRIER.

FACTORS' ACT, 8.

CONSTITUTIONAL LAW.

1. The Constitution (art. 1, § 6.) does not protect a witness in a criminal prosecution against another from being compelled to give testimony which implicates him in a crime when he has been protected by statute against the use of such testimony on his own trial. *People v. Kelly*, 94

2. That the information thus elicited facilitates the discovery of other evidence by which the witness may be subsequently convicted, is an incidental consequence against which the Constitution does not guard him. *Its*

prohibition is simply against his being required to give evidence where he himself is upon trial. *id*

3. The tolls imposed, at the time of the adoption of the Constitution of 1848, on freight carried on railroads, were not, within the meaning of that instrument, part of the revenues of the State canals, though payable to the commissioners of the canal fund. *People v. N. Y. Central R. R. Co.*, 485

4. The act (ch. 497 of 1851), repealing the laws imposing such tolls is, therefore, consistent with art. 7 of the Constitution, which irrevocably pledges the revenues of the canals to the payment of certain debts, and to their completion; and the act is valid. *id*

5. The statute (ch. 62 of 1853), in authorizing the construction of highways across railroad tracks without compensation, does not violate the constitutional provisions against taking private property for public use or impairing the obligation of contracts. *Albany Northern Railroad Company v. Brownell*, 345

6. The title which a railroad corporation acquires to its track is qualified as being taken for public use, and is subject to the exercise by the legislature of all the powers to which the franchises of the corporation are subject. *id*

See CRIMINAL LAW, 5.

CONSTRUCTION OF WRITTEN INSTRUMENT.

1. A writing in this form, "F. bought of W. one horse, \$150.

Received payment W.," given upon the purchase of and payment for the horse, is a mere receipt, and not a contract or bill of sale, so as to exclude parol evidence of a warranty of soundness of the horse by the vendor. *Filkins v. Whyland*, 338

See ASSIGNMENT, 3, 4.
GUARANTY.

CONTEMPT.

1. The refusal of a witness to answer a proper question before a grand jury is punishable as a contempt under the statute (2 R. S., p. 534, § 1, p. 735, § 14), as committed in a proceeding upon an indictment. *People v. Kelly*, 94

2. When the refusal was reported by the grand jury to the court, in the presence of the witness, who did not deny, but justified the same, and reiterated the refusal, the contempt is one "in the immediate view and presence of the court," and no affidavit or further evidence is requisite to a commitment. *id*

3. The appellate court, before which the propriety of a commitment for contempt is brought by *certiorari*, or even collaterally on *habeas corpus*, is bound to discharge the prisoner where the act charged as criminal is necessarily innocent or justifiable, or where it is the mere assertion of a constitutional right. *id*

4. The adjudication of the court in which the alleged contempt occurred, while conclusive that the party committed the act whereof he was convicted, and of its cha-

rafter, when that might, according to the circumstances, be meritorious or criminal, cannot establish as a contempt that which the law entitled the party to do.

id

CONVERSION.

See ACTION, 3.

CORPORATION.

1. A railroad corporation which has completed its road between the termini named in its charter or articles, forfeits its franchise by abandoning or ceasing to operate a part of the route. *People v. Albany and Vt. R. R. Co.*, 261

2. It seems that the corporation owes a duty to the public to exercise the franchise granted to it, and that it cannot abandon a portion of its road and incur a forfeiture at its mere pleasure: *Per DENIO, SUTHERLAND, ALLEN and SMITH, Js.* *id*

3. The remedy, however, is not an action in equity, on behalf of the public, to enforce a specific performance, but by mandamus or indictment, or, at the election of the State, by proceeding to annul the corporation. *id*

See DEBTOR AND CREDITOR.
PLANKROAD ACT.
TAXES AND ASSESSMENTS.

COUNTY COURT.

1. The jurisdiction given to the County Courts for the custody of habitual drunkards (Code, § 30,

sub. 3) is general, not limited to those having estates of less than \$250. *Davis v. Spencer*, 386

2. The reference in subdivision 11 of the same section to the powers of the old Courts of Common Pleas in this matter does not limit the effect of subdivision 8, but was intended to continue in the County Court cases then pending in the Common Pleas. *id*

CRIMINAL LAW.

1. Upon an indictment containing nine counts for embezzlement of different grades, and others for larceny, a verdict, "guilty of embezzlement," is equivalent to an acquittal of the larcenies charged, and a bar to any subsequent prosecution. *Guenther v. People*, 100

2. One of the counts for embezzlement being good, the verdict means that he is guilty of the offence as charged therein. *id*

3. An entry by order of the court after the jury was discharged, in amendment of the verdict as first recorded, that "the jury find the prisoner not guilty of the larceny charged," is unwarranted and nugatory. *id*

4. The word "may," in section thirty-three of the "act in relation to police and courts in the city of New York" (ch. 508 of 1860), is enabling, and not mandatory. *Williams v. People*, 405

5. Whether that section authorizing the infliction of the punishment of grand larceny for the theft from the person of another of less than twenty-five dollars is local within

the meaning of article III, section 16 of the Constitution: *Quara. id*

6. Under an indictment charging the larceny of several sums amounting to more than \$25, the prisoner has a right to have the jury instructed to find whether the sum stolen, it being from the person of another in the city of New York, was more or less than twenty-five dollars. *id*

D.

DAMAGES.

1. Reasonable counsel fees incurred in the defence of a suit to restrain the payment of an award, are recoverable upon a bond conditioned for the payment of all costs and damages arising from the obligor's obtaining an injunction or from his contesting the payment. *Corcoran v. Judson*, 106
2. In an action by a father, as administrator of his wife, who was killed by negligence, leaving children, the value of her earnings, and the probability that the children would have received an estate increased by such earnings on the death and intestacy of their father, cannot be considered in estimating damages. *Tilley v. Hudson River R. R. Co.*, 471
3. But the injury to the children, in the loss of maternal nurture and education, is a pecuniary one within the intent of the statute, and a proper ground of damages. *id*
4. It seems that, in such an action, evidence of the habitual occupa-

tion and employment of the deceased is admissible, to show her general capacity and relation to the family. *id*

See EVIDENCE, 2, 3.

DEBTOR AND CREDITOR.

1. A creditor in good faith of a manufacturing corporation which was organized, and its business conducted, for the purpose of defrauding the creditors of its president, has no priority of claim to property in the possession of such corporation over a creditor of the president. *Booth v. Bunce*, 592
2. The purchaser of goods of the corporation under execution against its president for his private debt, gets a good title as against a subsequent execution against the corporation. *id*

See ASSIGNMENT, 1.

HUBBARD AND WIFE, 9-11.

JUDGMENT BY CONFESSION, 1-4.
PAYMENT.

DEED.

1. An instrument, in the form of a mortgage, but containing the name of no mortgagee, does not become effectual at law by its delivery to one who advances money upon the agreement that he shall hold the paper as security for his loan. *Chauncey v. Arnold*, 330
2. Whether it could be made effectual by parol authority from the mortgagor to insert the lender's name as mortgagee: *Quara. id*

E.

EJECTMENT.

1. Ejectment lies by the owner of the fee in land subject to a public easement, against a party appropriating it to private occupation. *Carpenter v. The Oswego and Syracuse Railroad Company*, 655
2. The laying down in a street by a railroad corporation of its track and rails is such an exclusive occupation as to give an action to the owner of the fee, although the track has not been used, nor connected with other portions of the railroad which were in use. *id*

ESTOPPEL IN PAIS

See ATTORNEY.

EVIDENCE.

1. The exemplification of the record of a will, in order to be evidence, under ch. 94 of 1850, must contain the proofs taken before the surrogate. A mere exemplification of the will, recorded as having been proved, is insufficient. *Hill v. Crockford*, 128
2. In an action for breach of promise, evidence, drawn out by the plaintiff, of declarations by the defendant, tending to prove that his failure to marry the plaintiff proceeded from no want of respect or attachment to her, is proper for the consideration of the jury, in mitigation of damages. *Johnson v. Jenkins*, 252
3. The defendant in such an action is entitled to prove the truth of such declarations, and to show

that his mother, a woman in infirm health, was strenuously opposed to the match. *id*

4. On the cross-examination of a witness he cannot be asked whether he had been convicted of petit larceny, although he do not object. The party has a right to insist that the fact be proved, if at all, by the record. *Newcomb v. Grinwold*, 298
5. So also the party may object, though the witness do not, to a question whether the latter had made certain statements in an affidavit which was not produced. *id*
6. The attestation of a judgment of a State court, in order to make it evidence in another State, under the act of Congress, must be signed by the clerk: the attestation of a deputy-clerk is insufficient. *Morris v. Patchin*, 394
7. Such a defect is not cured by the certificate of the presiding magistrate of the State court that the attestation is in due form, and authorized by the State law. It is immaterial that the attestation conforms to the law of the State: it must conform to the act of Congress. *id*
8. In order to make the record of a judgment evidence, it must be signed by the officer authorized by law, and must have been filed in the proper office. Where the record itself fails to show these essentials to its validity, it seems that it is inadmissible to sustain process founded thereon, even though attested in the manner required by the act of Congress to authenticate a judgment. *id*

9. To corroborate the conductor on a railroad in respect to the time of the arrival of his train at a station, evidence is admissible that he made a contemporaneous memorandum, in compliance with a regulation requiring it; and the time-table regulating the running, stoppage, &c., of such train, may also be proved. *Barker v. N. Y. Central R. R. Co.*, 599

10. So, also, evidence is admissible of the regulations of the corporation, and of the custom of its agents, in respect to giving notice to passengers of the necessity of their changing cars in order to reach a given station. *id*

See BOND, 2.

CONSTRUCTION OF WRITTEN INSTRUMENT.

DAMAGES, 2, 4.
INSURANCE, 1.

EXECUTOR AND ADMINISTRATOR.

[*Grant of administration.*]

1. The relatives of a decedent are entitled to administer upon his estate under the statute (2 R. S., p. 74, § 27), although not entitled to a distributive share when the letters are granted. *Lathrop v. Smith*, 417

2. *Held*, accordingly, that, where the father of the decedent, who was entitled to his personal estate, had renounced, the brother was entitled to administration before a creditor. *id*

3. *The Public Administrator v. Peters* (1 Bradf., 100), overruled. *id*

See ASSIGNMENT, 1.

HUSBAND AND WIFE, 3.

SUBROGATE'S COURT, 2-5.

F.

FACTORS' ACT.

1. The Factors' Act (ch. 179 of 1830) protects one who makes advances upon the faith of the documentary evidence of title furnished by a warehouse-keeper's receipt of imported goods procured by a factor by his being intrusted with an invoice of the goods, although the invoice showed that the goods belonged to the shipper. *Cartwright v. Wilmerding*, 521

2. The factor's making a warehouse entry at the custom-house, taking a warehouseman's receipt and transferring it with authority to make the withdrawal entry at the custom-house, enable the pledgee to reduce the property to his possession as effectually as a custom-house permit, and are equivalent thereto as a security under the act. *id*

3. The pledgee, acting upon the faith of documents which, according to the course of business, were sufficient to transfer the property in goods warehoused subject to duties, and which contain nothing to indicate any title out of the pledgor, is not bound to inspect the warehousing entry which is retained at the custom-house, and, in the course of business, would not be in possession of the owner of goods which he had himself imported. *id*

4. It is unnecessary that the principal should have intrusted his factor with the identical evidence of title, on the faith of which he procures a loan. Intrusting him with the primary document is equivalent to intrusting him with all others which, in the ordinary usage of trade, grow out of it. *id*

5. That the pledge, and the delivery of the documentary instruments thereof, are separated by some interval of time, is no otherwise important than as it may raise a suspicion that the giving security was an afterthought. *id*

6. Goods in warehouse, subject to be withdrawn at pleasure by a factor, on discharging the lien of government for duties, may be regarded as in his possession, so as to support a pledge thereof made by him, independent of the provisions of the act in regard to documentary evidences of title. *id*

7. A shipping bill, executed by the owner of property and of the canal boat on which it is laden for transportation, stating that it is to be delivered as addressed, viz., "Account J. F. M., care of Dows & Cary," though not signed by the master of the boat, nor containing any words of negotiability, is substantially a bill of lading, and affects the title to the goods in the same manner as if it were in regular form. *Dows v. Greene*, 638

8. Under such a bill, Dows & Cary are the consignees, and have a lien under the factors' act (chap. 179 of 1830), in respect to any money advanced by them to J. F. M. *id*

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9. It seems that, at common law and independent of the factors' act, the transfer of a bill of lading to a *bona fide* holder would transfer the title in the same manner as a transfer of the goods, although the bill had been obtained from the owner of the property by fraud. *Dows v. Perrin* (16 N. Y., 325), in this respect questioned. *id*

FOREIGN LAW.

See CONFLICT OF LAWS
EVIDENCE, 7.

FRANCHISE, FORFEITURE OF.

See CORPORATION, 1, 2.

FRAUD.

1. Though the omission of a purchaser of goods for credit to disclose his insolvency is not necessarily fraudulent, yet if the purchase be made with a preconceived design not to pay, it is a fraud. *Ellenquist v. Naylor*, 169

2. Such design may be inferred by the jury from the circumstances and conduct of the vendee, not only in respect to the sale in question but in other contemporaneous transactions. *id*

See ACTION, 4, 5.

DEBTOR AND CREDITOR.

HUSBAND AND WIFE, 9, 11.

MORTGAGE OF CHATTELS.

FRAUDS, STATUTE OF.

1. A subscription by the agent of the party to be charged is suffi-

cient under the statute of frauds, though the name or existence of a principal does not appear upon the instrument. *Dykens v. Townsend*, 57

G.

GUARANTY.

1. A contract to be "accountable that B will pay you for glass, paints, &c., which he may require in his business, to the extent of fifty dollars," is a continuing guaranty. The limitation is not of the credit to B, but of the extent of the guarantor's liability. *Rindge v. Judson*, 64

2. The doctrine of *Gates v. McKee* (3 Kern., 232), reaffirmed. *id*

H.

HIGHWAY.

1. A highway cannot be laid out over grounds acquired by a railroad corporation for the site of an engine-house, &c., necessary for its use at a station. *Albany Northern R. R. Co. v. Brownell*, 345
2. An injunction suit will lie to restrain highway commissioners from taking possession of such a site. *id*
3. It seems that an injunction suit will not lie in a case where the commissioners would have the right to lay out a highway, but fail to acquire jurisdiction, or where their proceedings were irregular. *id*

4. Ground adjoining a saw-mill and used for piling logs, but whose limits are not fixed by fences or other visible marks, nor by definite occupation, is not within the statute (1 R. S., p. 514, § 57) prohibiting the laying out of public roads through mill-yards. *People v. Kingman*, 559

5. It is the duty of the commissioners, in laying a highway over such ground, to leave a sufficient area for the use of the mill-owner, and their discretion as to the quantum is not reviewable in any other proceeding. *id*

6. The ditch or canal by which the water is conducted to a mill is not a building, fixture or erection, within the meaning of the statute. A highway may be laid along it, comprehending it in whole or in part within the limits of the road; but if necessary to work the road to its entire width, it must be by so constructing a roadway over the channel as not to obstruct the flow of water. *id*

7. It is not essential to a highway, at common law or under our statute, that it be a thoroughfare. A road may be laid out by the public authority which has no issue at one extremity, and abuts upon private ground. *id*

See CONSTITUTIONAL LAW, 5.

EJECTMENT.

NUMERUS.

HUSBAND AND WIFE.

1. A confession of judgment, without action, by a married woman, is void, although the consideration be money borrowed for and

applied to the improvement of her separate estate. *Watkins v. Abrahams*, 72

2. When husband and wife unite in confessing a judgment, it may be retained as good against the husband, though void as to the wife. *id*

3. At common law, a husband is entitled to the personal property and choses in action of his wife, and they are vested in him at her death, whether reduced to possession or not, in virtue of his marital right, and not of his right to administration. *Ryder v. Hulse*, 372

4. The statutes of 1848 and 1849, for the protection of married women, gave no power to the wife to dispose by will of property acquired by her before the passage of the acts, or of the interest accruing after the acts upon money previously given to her, or of the proceeds of her own labor which her husband permitted her to receive, manage and invest in her own name and as if it were her own property. *id*

5. Evidence of such a course of dealing by the wife with personal property bequeathed to and earned by her, and her husband's declarations that she could give her money to whom she pleased, only establish an omission to exercise his marital rights in her lifetime, and do not imply a relinquishment of his rights in case of survivorship. *id*

6. A wife, by allowing chattels belonging to her, and which remain *in specie*, to be employed by her husband in the carrying on of a business for their common benefit,

does not devote them to her husband so as to render them liable for his debts. *Sherman v. Elder*, 381

7. Otherwise, it seems, as to articles used by the husband as merchandise, whether a part of the goods belonging to the wife before marriage or purchased out of the earnings and accumulations of the business: *Per ALLEN, J.* *id*

8. An assignment by the wife of the goods and chattels, "as well as all claims and demands for any portion of them," is valid, and carries the right of action for the taking by a creditor of that part of her property which remained *in specie* and was not made merchandise, though used by the husband in his business. *id*

9. A husband, indebted to his wife in the sum of one thousand five hundred dollars and interest, for property which belonged to her at law, and in the further sum of two thousand dollars, with interest, for which equity would have regarded her as a creditor, transferred to the wife property, real and personal, to the value of sixteen thousand dollars. Such transfer, it seems, is not to be regarded as voluntary. *Babcock v. Eckler*, 623

10. But, if voluntary, the husband retaining property of the value of ten thousand dollars, and being indebted in only the sum of nine hundred dollars, there is no legal presumption of fraud, but the question is one of fact. *id*

11. The intent to defraud must be inferable from the circumstances; and, if the facts show that the

settlement upon the wife was a proper and reasonable one, in the condition of the husband's estate at the time, it will not be invalidated by his subsequent inability to pay a debt then existing. *id*

See CONFESSION OF LOAN.
DAMAGES, 2.

I

INJUNCTION.

See DAMAGES, 1.
HIGHWAY, 2, 3.

INSURANCE (MARINE).

1. A marine policy of insurance "upon the whole tackle," &c., of a vessel, containing a warranty that "the property is free from all liens," parol evidence is admissible that the property insured was the owner's equity of redemption in the vessel which was subject to certain mortgages known to the insurer. *Didwell v. North Western Ins. Co.*, 302

2. The existence of such mortgages is no breach of the warranty. *id*

See SEAMAN'S WAGER.

J.

JUDGMENT.

See CONTRACT, 3, 4.

JUDGMENT BY CONFESSION.

1. A judgment by confession, entered upon an insufficient state-

ment, but not impeached for actual fraud, is good as between the parties. *Miller v. Earle*, 110

2. Where the property of the defendant has been sold under an execution upon such a judgment, the purchaser's title cannot be impeached by a creditor having no judgment or lien on the property at the time of the levy. *id*

3. A judgment by confession is valid as between the parties, though the statement on which it is founded does not conform to the Code in setting forth the origin and particulars of the indebtedness. *Neusbaum v. Keim*, 325

4. Such a judgment, therefore, upon proof of its *bona fides*, authorizes the creditor to impeach a fraudulent transfer by his debtor. *id*

5. A statement, it seems, is sufficient under the Code, which, after declaring that the plaintiff had sold and delivered to the debtor large quantities of meat in 1854 and 1855, averred that there was justly due him, upon such sales, a balance of \$2,114, with interest from January 18, 1855. *id*

6. A statement is sufficient to authorize the entry of judgment by confession, under section 383 of the Code, which sets forth that "the plaintiff has this day indorsed my notes, payable at bank, for \$4,000 in all, for my accommodation, and to enable me to negotiate said notes," without any further description of the notes. *Hopkins v. Nelson*, 518

JUSTICE OF THE PEACE

1. The return of a justice of the peace to a certiorari, under the Code, must contain all the testimony received by him. *Orcutt v. Cahill*, 578
2. Where a justice's return sets forth evidence in detail, it is to be considered as stating the whole testimony, unless the contrary distinctly appears. *id*

See APPEAL.

L

LIBEL.

1. The statute (ch. 130 of 1854) exempting from prosecution for libel the publishers of legislative debates, &c., is prospective only, and is no defence for a publication prior to its enactment. *Sanford v. Bennett*, 20
2. The publication of a slander uttered by a murderer at the time of his execution, is not privileged either under that statute or at the common law. *id*
3. The statute relates only to statements made in judicial, legislative or administrative bodies in execution of some public duty. *id*

LIMITATIONS, STATUTE OF.

See BANKRUPT LAW, 2.
MUTUAL INSURANCE COMPANY.

M

MANDAMUS.

1. Chapter 375 of 1852 required the raising by tax on the town of Genoa of the interest on certain bonds of that town, the money to be received and paid to the bondholders by commissioners appointed for that purpose. The money having been raised, it seems that mandamus to the commissioners is the proper remedy to enforce payment, and not an action against the town. *People v. Mead*, 114

MARITIME LAW.

See SEAMEN'S WAGES.

MASTER AND SERVANT.

1. A master is responsible to his servant for injuries received by the latter from defects in the building in which the services are rendered, which the master knew, or ought to have known. *Ryan v. Fowler*, 410
2. *Held*, accordingly, that a girl injured by the fall of a privy attached in an insecure and dangerous manner to the factory in which she was employed, may recover damages from the employer. *id*
3. The case of *Seymour v. Maddox* (71 Eng. C. L., 326), questioned. *id*

See NEGLIGENCE, 3-8.

MORTGAGE OF CHATTELS.

1. An agreement, upon the mortgage of chattels, that the mort-

gagor shall keep possession and retail the goods for cash only, paying over the money to the mortgagee, is not fraudulent in law, but presents a question of good faith for the jury. *Ford v. Williams*, 359

MORTGAGOR AND MORTGAGEE

1. Where land is conveyed subject to a usurious mortgage, which the grantee assumes to pay, the mortgagee acquires a right to an appropriation of the land for that purpose, which cannot be divested without his assent. *Hartley v. Harrison*, 170
2. *Held*, accordingly, that a subsequent arrangement between the parties to the deed, whereby, as between them, it became a mere quitclaim, was inoperative to open the defence of usury to the grantee. *id*
3. *Quare*, however, whether the personal liability assumed by the grantee is not discharged by the release of his grantor. So held in the Supreme Court, and the question not passed upon by this court. *id*
4. A mortgagee may maintain a personal action against a grantee of the mortgaged premises who has assumed to pay the incumbrance. *Burr v. Beers*, 178
5. He may pursue this remedy without foreclosing the mortgage and without joining the mortgagor as defendant. *id*

See DEED, 1, 2.

MUTUAL INSURANCE COMPANIES.

1. A note given to a mutual fire insurance company, organized under the general law, as one of the notes required by the statute (chap. 308 of 1849) to make up its capital, is, in legal effect, payable on demand, *i. e.*, at its date, though by its terms payment was to be made at such times and in such portions as the directors might require. *Howland v. Edmonds*, 307
2. No actual demand is necessary in respect to such a note. The statute under which it is given fastens on it the character of a note payable absolutely, or at the mere will of the holder. *id*
3. The statute of limitations begins to run against such a note at the time it is given, and is a good defence at the expiration of six years from that time. *id*

N.

NEGLIGENCE.

1. A contract between a railroad corporation and a gratuitous passenger, by which the former is exempted from liability under any circumstances of the negligence of its agents for any injury to the passenger is not against law or public policy and is valid. *Wells v. N. Y. C. R. R. Co.*, 181
2. It is immaterial whether the negligence of the agents be slight or gross. The supposed distinction between different degrees of

negligence, in respect to the liability of common carriers, discarded as illusory and impracticable. *id*

3. A railroad corporation cannot, by contract, exempt itself from liability to a passenger for damage resulting from its own willful misconduct, or recklessness which is equivalent thereto. *Perkins v. The Same*, 196

4. But in respect to a gratuitous passenger it may contract for exemption from liability for any degree of negligence in its servants, other than the board of directors or managers who represent the corporation itself for all general purposes. *id*

5. Whether the corporation is liable to a free passenger, so contracting, for negligence in the construction of the road, as upon an implied guaranty of its security, when the misconduct from which the injury resulted was that of a trackmaster who, knowingly, used rotten material in building a bridge, there being no evidence that it was known to the superior managing officers: *Quere*. *id*

6. *It seems* that the owner of cattle, transported for hire on a railroad, and who goes along in charge of them, under a contract that "the persons riding free to take charge of the stock do so at their own risk of personal injury from whatever cause," is not to be regarded as a gratuitous passenger: *Per Wright, Denis and Davies, Jr. Smith v. The Same*, 222

7. Whether, as to one who, in the manner stated, gives some consideration for being carried, a contract is valid which aims to ex-

empt the carrier from liability for damages resulting from the negligence of his servants: *Quere*. *id*

8. The owner of cattle traveling in charge of them under such a contract, and paying no independent consideration for the conveyance of himself, was injured by the gross negligence of an agent of the carrier in using an unfit and dangerous car. The carrier was held liable, by a divided court: four of the judges going on the ground that the contract for exemption from liability was void, as against public policy; and the fifth, that the negligence, as it respected the machinery of transportation, is imputable to the carrier himself. *id*

9. A party, claiming to have been injured by the negligence of another, must fail in his action, unless it appear that he was free from any negligence without which the injury would not have happened. The greatest negligence on the part of the defendant will not cure the defect of the least negligence contributing to the injury on the plaintiff's part. *Wilde v. Hudson River R. R. Co.*, 430

10. Cases of negligence form no exception to the rule that it is the judge's duty to nonsuit where a verdict for the plaintiff would be clearly against the weight of evidence. *id*

11. One driving in a highway across a railroad is guilty of negligence fatal to an action, if he does so without looking for a train which he would have seen, or listening for signals of its approach which

he would have heard, in time to have avoided a collision. *id*

12. It is also such negligence in one knowing the position of the railroad and the frequent passage of trains, to approach the crossing at such speed as to be unable to stop his horses before actually getting upon the track. It is error to refuse so to charge without the qualification that the defendant must have used proper precautions to notify travelers of the approach of a train. *id*

13. A passenger was pointed by an agent of the carrier to a train then standing in his sight as one which would convey him to Lyons. That train, after running one hundred and fifty miles, deflected to a branch road not passing through Lyons, but was followed an hour afterwards by another train which passed through Lyons. *Held*, that the passenger was in fault for being miscarried, if, at or before reaching the point of divergence, the carrier used such means as would have conveyed to a traveler of ordinary intelligence, using reasonable care and attention, information of the necessity of his transferring himself to the second train. *Barker v. N. Y. Central Railroad Co.*, 599

14. If the traveler, without fault on his part, passed the point of divergence, but was apprised of his error and requested to take a return train on which he would have been carried free, in season to have reached a train which would have carried him to Lyons without delay, his refusal to do so, and persisting in remaining upon the wrong train, renders him a

trespasser, liable to ejection from the cars. *id*

See DAMAGES, 2-4.

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NUISANCE.

1. Where land has been taken for a turnpike, and afterwards transferred, by legislative authority, to a railroad company, without compensation by the latter to the owner of the fee, he may maintain successive actions for damages resulting from such occupation, as a continuing nuisance. *Mahon v. N. Y. C. R. R. Co.*, 658

2. The use of the land for a railroad is totally different from that public right of passage for which highways were designed. *id*

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PARTNERSHIP.

1. Real estate, acquired with partnership effects in collecting debts due the firm, although so conveyed as to make the partners tenants-in-common at law, is, in equity, considered as converted into personalty, for the purpose of subjecting it to the debts of the firm, in preference to those of the individual partners. *Columb v. Read*, 505

2. When notice of change of firm name is relied upon to exonerate a retiring partner, such change must show that he has withdrawn from the business. A change not indicating this is insufficient to put dealers upon inquiry. *Am. Linen Thread Co. v. Workendyke*, 550

3. Accordingly, where one of three brothers, under the firm of Wortendyke Brothers, retired, and, being succeeded by H., the firm was changed to Wortendyke Brothers & Co., — *Held*, that a dealer with the firm was warranted in assuming that all the former partners remained in the business, and, until notice to the contrary, the brother who had retired continued liable. *id*

4. Where there is no agreement to the contrary, each partner, after a dissolution, possesses the same authority to adjust the affairs of the concern, by collecting its debts and disposing of its property, as before the dissolution. *Robbins v. Fuller*, 570.

5. This right is not lost by the fact that the partnership debts are paid; nor, *it seems*, does it depend upon the state of the accounts between the partners, at all events not as against persons having no notice of the fact. *id*

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1. An agreement between the payee of a note and the maker, made with the assent of the latter's partner, to apply the indebtedness of the payee to such maker and his partner in payment of the note, operates *in presenti* as a satisfaction of the note *pro tanto*. *Davis v. Spencer*, 386

2. Whether the assent of the partner was necessary or material: *Quære*. *id*

See ASSIGNMENT, 1.

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PLANKROAD ACT.

1. Under the general plankroad act (ch. 210 of 1847), those only who subscribe the articles of association are entitled to stock or compellable to pay for the same. *Poughkeepsie & Salt Point Plankroad Co. v. Griffin*, 150

2. The preliminary subscription and other steps prior to the signing of the articles of association are provisional and inchoate, creating no fixed right and imposing no obligation on the parties. *id*

3. *It seems* that one otherwise liable as a corporator would not be discharged by reason of the legislature's having extended the time for laying plank and permitting the corporation, in the meantime, to act and collect tolls as a turnpike company. *Per DEMO, J.* *id*

PLEADING.

1. The ownership of a promissory note by the plaintiff is sufficiently shown by the averment of its making, indorsement and delivery to him before maturity, for a valuable consideration, though coupled with the statement that it was, "by the Bank of Commerce, in the city of New York, which then held the same," presented for payment at another bank in that city, where it was payable. *Farmers' and Mechanics' Bank of Genesee v. Wadsworth*, 547

2. The statement in respect to the Bank of Commerce imports only a holding as the plaintiff's agent for collection, and not ownership. *id*

See ACTION, 3, 4.

PLEDGE

See FACTORS' ACT.

PRACTICE

1. Where the complaint prays for the specific performance of a contract to convey lands or for damages, but shows that the defendant is incapable of conveying, and the parties go to trial, the court, under the Code, is not to dismiss the complaint, but to retain the case for the purpose of awarding damages. *Barlow v. Scott*, 40
2. It is no ground for reversing the judgment in such a case that the trial was by the court without jury, where it does not appear in the case that the objection was taken at the trial. *id*

PRINCIPAL AND FACTOR

See FACTORS' ACT.

Q

QUO WARRANTO.

1. The question whether a town has been legally erected may be tested in an action in the nature of quo warranto against one claiming to exercise the office of supervisor of such town. *People v. Carpenter*, 86

R

RAILROAD CORPORATION.

See CONSTITUTIONAL LAW, 4-6.

See CORPORATION.

HIGHWAY, 1.

NEGLECTANCE.

STATUTE, CONSTRUCTION OF, 6.

RELEASE

See MORTGAGE AND MORTGAGEE, 2, 3.

RES JUDICATA.

See CONTEMPT, 3, 4.

S

SALE AND DELIVERY OF CHATTELS.

1. The vendee of goods which had come to his possession, ascertaining his insolvency, deposited them in warehouse subject to the order of the vendor, and notified him thereof by letter: before the vendor had signified his assent, the goods were attached by another creditor. *Held*, that the title of the vendor prevailed. *Shurtzant v. Orser*, 538
2. The delivery to the warehouseman was a rescission of the contract of sale by the vendee, and the subsequent assent of the vendor relates to the time of such delivery: *Per* SMITH, J. *id*
3. An actual assent to the rescission by the vendor's agent is to be assumed in support of the judgment, upon a statement of facts in harmony with such actual assent, and the absence of any facts tending to repel such presumption: *Per* DENIO, J. *id*

See FACTORS' ACT.
FRAUD.

SEAMEN'S WAGES.

1. The owner of a ship, having chartered her for a voyage, effected insurance upon the freight, earned or not earned. The ship was wrecked near her port of discharge, and the insured abandoned the freight to the underwriter. The seamen saved from the rigging, &c., enough to pay their wages, and also part of the cargo, on which the freight was enough to pay their wages: *Held*,

1. That the seamen were entitled to wages for the voyage, and not merely from the time of the casualty. They take their pay as wages, and not as salvage.

2. The wages, upon the abandonment, became a charge upon the ship and owner, in exoneration of the freight. *Daniels v. Atlantic Mut. Ins. Co.*, 447

SHIPS AND VESSELS.

See INSURANCE.
SEAMEN'S WAGES.

SPECIFIC PERFORMANCE.

See AGREEMENT, 1, 2.
CORPORATION, 3.
PRACTICE, 1.

STATUTES, CONSTRUCTION OF.

1. The statute (ch. 270 of 1847) making a company which owns

a railroad connecting with one or more other roads, and receives freight to be transported to a place on the line of a road thus connected, liable as common carriers for the delivery thereof, applies as well where one of the connecting roads is wholly beyond this State as where all are within it. *Burtis v. Buffalo and State Line R. R. Co.*, 269

2. The statute not only imposes the duty, upon the company undertaking it, of delivering the goods at the place of destination, but enables it to make a special contract for their delivery in a limited time. *id*

3. *Held*, accordingly, that a company whose road terminated at the boundary of this State, where it connected with a chain of roads running through Pennsylvania, Ohio, &c., was liable, under its special contract, for the delivery of goods, in three days, at a point in Illinois, upon such chain of roads. *id*

4. *It seems* that such special contract is valid at common law, independently of the statute: *Per DIXON, DAVIES, GOULD and ALLEN, J.* *id*

5. The act in relation to the sale of bottles, &c. (ch. 117 of 1860), imposes no penalty for the secreting of a bottle, though subjecting a dealer in bottles to a search-warrant. *Mullins v. People*, 309

6. A contractor for the construction of part of a railroad is not a laborer or servant, within the provision of the general railroad act making stockholders personally liable for the debts of the corporation. *Aikin v. Wasson*, 482

gagor shall keep possession and retail the goods for cash only, paying over the money to the mortgagee, is not fraudulent in law, but presents a question of good faith for the jury. *Ford v. Williams*, 359

MORTGAGOR AND MORTGAGEE

1. Where land is conveyed subject to a usurious mortgage, which the grantee assumes to pay, the mortgagee acquires a right to an appropriation of the land for that purpose, which cannot be divested without his assent. *Hartley v. Harrison*, 170
2. Held, accordingly, that a subsequent arrangement between the parties to the deed, whereby, as between them, it became a mere quitclaim, was inoperative to open the defence of usury to the grantee. *id*
3. *Quare*, however, whether the personal liability assumed by the grantee is not discharged by the release of his grantor. So held in the Supreme Court, and the question not passed upon by this court. *id*
4. A mortgagee may maintain a personal action against a grantee of the mortgaged premises who has assumed to pay the incumbrance. *Burr v. Beers*, 178
5. He may pursue this remedy without foreclosing the mortgage and without joining the mortgagor as defendant. *id*

See DEED, 1, 2.

MUTUAL INSURANCE COMPANIES.

1. A note given to a mutual fire insurance company, organized under the general law, as one of the notes required by the statute (chap. 308 of 1849) to make up its capital, is, in legal effect, payable on demand, i. e., at its date, though by its terms payment was to be made at such times and in such portions as the directors might require. *Howland v. Edmonds*, 307
2. No actual demand is necessary in respect to such a note. The statute under which it is given fastens on it the character of a note payable absolutely, or at the mere will of the holder. *id*
3. The statute of limitations begins to run against such a note at the time it is given, and is a good defence at the expiration of six years from that time. *id*

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thirty, and to pay all that should remain of principal and accumulated income to the son upon the condition that he should then, in the opinion of the executors, be solvent. The executors having renounced — *Held*:

The provision for the increase of the son's annuity became ineffectual, the discretion being absolute and personal.

The determination as to solvency of the son at the age of thirty is not a matter of personal discretion; but, as it rests upon a fact judicially ascertainable, effect is to be given to the provision, notwithstanding the renunciation of the trustees.

The provision for the accumulation of income during the interval between the son's majority and the age of thirty years is void, and the income for that period goes as in case of intestacy. *Hull v. Hull*, 647

See ACTION, 1.
EVINSON, 1.
TRUSTS.

WITNESS.

See CONSTITUTIONAL LAW, 1, 2.
CONTEMPT.
EVIDENCE, 4, 5.



